INDEX

637102—45——1

CITATIONS

Cases: Page

Cases—Continued. Page

Cases—Continued. Page

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 788

HARRY BRIDGES, PETITIONER

v.

I. F. WIXON, AS DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion in the circuit court of appeals of Circuit Judge Wilbur (R. 7770–7793), the concurring opinion of Circuit Judge Stephens (R. 7793–7794), and the dissenting opinion of Circuit Judge Healy (R. 7794–7809) are reported at 144 F. 2d 927.[1] The opinion of Judge Stephens (R. 7811–7812) rendered in connection with the denial of a

[1] The appeal was heard before a bench of five circuit judges (R. 7770). Judge Mathews agreed with Judges Wilbur and Stephens (R. 7794); Judge Garrecht agreed with the dissent (R. 7809).

petition for rehearing is reported at 144 F. 2d 944.[2] The opinion and order of the district court (R. 723–759) are reported at 49 F. Supp. 292.

JURISDICTION

The judgment of the circuit court of appeals was entered on June 26, 1944 (R. 7810). A petition for rehearing was denied on September 27, 1944 (R. 7811). The petition for a writ of certiorari was filed on December 27, 1944, and was granted on January 29, 1945. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, by the tests applicable in a habeas corpus proceeding instituted to secure collateral review of a deportation order, the evidence adequately sustains the essential findings of the Attorney General upon which the deportation order rests.

2. Whether petitioner was denied due process by reason of alleged abuses committed in the institution and conduct of the deportation proceeding.

3. Whether the deportation statute as construed and applied to petitioner denies him freedom of speech and association in violation of his constitutional rights.

---

[2] Judge Stephens, on November 1, 1944, filed an amendment to his opinion (R. 7815).

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in Appendix A, *infra*, pp. 126–130.

STATEMENT

Petitioner is an alien,[3] a native and citizen of Australia (R. 778–780, 7736–7737), who entered the United States in April 1920 (R. 791, 7735). He has been in the United States continuously since that time, apart from several voyages as a seaman on American vessels, the last of which occurred in 1922 (R. 791–792). In March 1938, deportation proceedings were instituted against petitioner under Section 2 of the Act of October 16, 1918, as amended by the Act of June 5, 1920 (40 Stat. 1012, 41 Stat. 1008–1009)[4] on the ground that after his entry into

[3] Petitioner has filed three declarations of intention to become a citizen (Gov. Exs. 277, R. 6070–6074; 279, R. 6089; 296, R. 7735). He allowed the first two to lapse (R. 508), and the last, which was filed on March 28, 1939, apparently is still pending.

[4] Prior to its amendment by Title II, Section 23, of the Act of June 28, 1940 (c. 439, 54 Stat. 673, Appendix A, pp. 126–127, *infra*), Section 2 of the 1918 Act (40 Stat. 1012) read as follows:

"That any alien who, at any time after entering the United States, is found to have been at the time of entry, or to have become thereafter, a member of any one of the classes of aliens enumerated in section one of this Act, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported in the manner provided in the immigration Act of February fifth, nineteen hundred and seventeen. The provisions of this section shall be applicable to the classes of

the United States he had become a member of and affiliated with an organization that advised, advocated and taught the overthrow by force and violence of the Government of the United States and that caused to be written, circulated, distributed, printed, published, and displayed printed matter advising, advocating and teaching the overthrow by force and violence of the Government of the United States (R. 73–74, 503). James M. Landis, Dean of the Harvard Law School, was appointed trial examiner for the purpose of hearing the case, and hearings were held from July 10 to September 14, 1939 (R. 74, 504).

On June 12, 1939, following the decision of this Court in *Kessler* v. *Strecker*, 307 U. S. 22,[5] the

---

aliens mentioned in this Act irrespective of the time of their entry into the United States."

Section 1 of the Act, referred to in the foregoing excerpt, deals with the admission of aliens. The 1940 Amendment changed only the first paragraph of Section 1. Prior to its amendment, the first paragraph read as follows: "That the following aliens shall be excluded from admission into the United States." This was amended by the 1940 Act to read: "That any alien who, at any time, shall be or shall have been a member of any one of the following classes shall be excluded from admission into the United States."

[5] In the *Strecker* case, which was decided on April 17, 1939, the question was whether former membership in an organization described in the 1918 Act, which had ceased, was a ground of deportation. The Court held that it was not, stating (307 U. S. at 30) "* * * we conclude that it is the *present membership*, or *present affiliation*—a fact to be determined on evidence—which bars admission, bars nat-

warrant upon which the proceedings had been instituted was amended to charge that petitioner both had been and then was a member of or affiliated with the organization described in the warrant (R. 503). At the hearings before Dean Landis, the Government claimed that petitioner was a member of or affiliated with the Communist Party of the United States, and that the party was an organization of the character described in the 1918 Act (R. 503–504, 508). Petitioner denied that he was a member of the Communist Party or had ever been a member (R. 509), and in December 1939 Dean Landis concluded that the evidence established neither that petitioner "is a member of nor affiliated with the Communist Party of the United States of America" (R. 636). Accordingly, he did not pass upon the question whether that party was an organization within the Act (R. 497). In January 1940, the Secretary of Labor sustained Dean Landis and dismissed the proceedings against petitioner (R. 75, 139).

On June 28, 1940, Congress amended the deportation statute in question so as to provide for deportation of any alien who was "at the time of entering the United States, or has been at any

uralization, and requires deportation." [Italics as in original.] Dean Landis stated (R. 508, fn. 17) that the decision "left uncertain the particular time as of which the facts of membership, etc., have to be proved, though the inference derivable from the opinion is that the significant time is that of the issuance of the warrant of arrest."

time thereafter" a member of the classes of aliens specified (Act of June 28, 1940, c. 439, Title II, sec. 23, 54 Stat. 673; see Appendix A, pp. 126–127, *infra*). The sponsors of the amendment stated that it was designed to obviate the construction placed upon the statute by the *Strecker* case that only present membership or affiliation required deportation (86 Cong. Rec. 8343, 9031–9032). The Attorney General then directed the Federal Bureau of Investigation to determine whether under the statute, as amended, grounds existed for reopening the deportation proceedings against petitioner, and as a result of this investigation a second deportation proceeding was instituted against petitioner on February 14, 1941 (R. 76).[1] The warrant of arrest charged that petitioner was deportable under the provisions of the Act of October 16, 1918, as amended by the Acts of June 5, 1920, and June 28, 1940 (Appendix A, pp. 126–127, *infra*) in that, after entering the United States, he had been a member of or affiliated with an organization (1) that believes in, advises, advocates or teaches the overthrow by force or violence of the Government of the United States; and (2) that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or (3) that has in its possession for the purpose of circulation, distribution, publication,

[1] Petitioner was released under bond of $3,000 (R. 76).

issue or display, written or printed matter advising, advocating or teaching the overthrow by force or by violence of the Government of the United States (Gov. Ex. 1, R. 771–773; R. 142–143).

Charles B. Sears, a retired judge of the New York Court of Appeals, was appointed an inspector in the Immigration and Naturalization Service of the Department of Justice to preside over the hearings, take testimony, and make appropriate recommendations (R. 76, 141).[1] At the hearings

[1] The Regulations of the Immigration and Naturalization Service provide in respect of deportation proceedings that the alien shall be accorded a hearing before an immigrant inspector to determine whether he is subject to deportation on the charges stated in the warrant of arrest, at which hearing the alien is entitled to representation by counsel and to offer evidence in his behalf. As soon as practicable after the hearing has been concluded, the inspector is required to prepare a memorandum setting forth a summary of the evidence adduced at the hearing, his proposed findings of fact and conclusions of law, and a proposed order, which are to be furnished to the alien or his counsel, who may file exception thereto and submit a brief (8 C. F. R. 150.6, 1941 Supp.). Thereafter, the case is heard by the Board of Immigration Appeals, a body in the office of the Attorney General authorized in his behalf to perform his functions in relation to deportation, but responsible solely to the Attorney General (8 C. F. R., 1940 Supp., 90.2–90.3). If exceptions have been filed, oral argument before the Board is permitted (*ibid.*, 90.5). Where a member of the Board dissents, where the Board certifies that a question of difficulty is involved, or in any case in which the Attorney General directs, the Board must refer the case to the Attorney General for review, and, if the Attorney General reverses the decision of the Board, the Attorney General must state in writing his conclusions and the reasons for his decision (*ibid.*, 90.12).

before Judge Sears, petitioner's membership in or affiliation with the Communist Party and subsidiaries or allies of the party, notably the Marine Workers Industrial Union, and his membership in the Industrial Workers of the World, constituted the conduct claimed by the Government as grounds for petitioner's deportation (R. 144, 147, 799, 807–808).[8] Judge Sears held hearings in San Francisco from March 31 to June 12, 1941, at which the petitioner was represented by counsel and the public and press were admitted (R. 76, 143–145). The evidence covered 44 volumes of 7,546 typewritten pages; and, in addition, the Government introduced 297 exhibits, and the petitioner 62 (R. 76, 143–144).

On September 26, 1941, Judge Sears transmitted to the Attorney General a Memorandum of Decision, analyzing the evidence which had been adduced, and containing proposed findings of fact, conclusions of law and order (R. 76–77, 134–347). Judge Sears found that the Communist Party of the United States of America was "from the time of its inception in 1919 to the present time * * * an organization that believes in,

[8] During the hearings before Judge Sears, the warrant of arrest was amended to include the charge that petitioner was deportable because of his membership in the I. W. W., an organization claimed by the Government to fall within the provisions of subsection (c) of Section 1 of the 1918 Act, as amended, Appendix A, p. 126, *infra*, relating to organizations advising, advocating, or teaching "(3) the unlawful damage, injury or destruction of property, or (4) sabotage" (R. 144).

advises, advocates, and teaches the overthrow by force and violence of the Government of the United States;" that it was an organization that "writes, circulates, distributes, prints, publishes, and displays printed matter advising, advocating, or teaching" such overthrow; that it was an organization "that causes to be written, circulated, distributed, printed, published, and displayed printed matter advising, advocating, and teaching" such overthrow; that it was an organization that "has in its possession for the purpose of circulation, distribution, publication, issue and display, printed matter advising, advocating, and teaching" such overthrow; that the Marine Workers Industrial Union "was a part of the Communist Party, dominated and controlled by it" and advocated a similar overthrow of the Government of the United States; and that after entering the United States, petitioner had been a member of the Communist Party and had been affiliated with both the Communist Party and the Marine Workers Industrial Union (R. 337–338).[9] Accordingly, Judge Sears concluded that petitioner was subject to deportation under the statute involved (R. 338–339) and submitted a proposed order for

[9] While Judge Sears in the course of his memorandum stated that petitioner had been a member of the I. W. W. (cf. fn. 8, p. 8, *supra*) for a period of six or seven months beginning June or July 1921 (R. 330), he found, however, that the I. W. W. during that period was not an organization that advocated the illegal destruction or injury of property or circulated documents so advocating (R. 334).

petitioner's deportation to Australia (R. 340–341). Petitioner filed exceptions to the proposed findings (R. 348–365), and, briefs having been filed, the case was heard on oral argument before the Board of Immigration Appeals (see fn. 7, p. 7, *supra*) on November 24, 1941 (R. 369). On January 3, 1942, the Board rendered an opinion rejecting Judge Sears' proposed findings on the issues of petitioner's membership in or affiliation with the Communist Party and the Marine Workers Industrial Union (R. 367–489), and affirmatively finding that petitioner had not been a member of or affiliated with those organizations at any time after he entered the United States (R. 490). In view of its findings on the issues of membership and affiliation, the Board stated that it was unnecessary to pass upon the issues of whether those organizations were of the nature described in the deportation statute (R. 370–371). Accordingly, the Board entered an order cancelling the warrant of arrest and closing the proceedings, but stayed execution of the order "pending further order of the Attorney General" (R. 492).

The Attorney General reviewed the decision of the Board, and on May 28, 1942, rendered an opinion and decision, in which he made findings in accordance with those proposed by Judge Sears and ordered petitioner's deportation (R. 73–106). Pursuant to the order of the

Attorney General, a warrant of deportation was issued on May 29, 1942 (R. 62–64), and petitioner surrendered himself to the custody of the respondent on June 2, 1942 (R. 27). On June 4, 1942, the Attorney General denied a petition seeking an opportunity to present argument and briefs to him for the purpose of reconsidering and reversing his decision (R. 678–687).

Petitioner filed a petition for a writ of habeas corpus in the District Court for the Northern District of California on June 2, 1942 (R. 2–17), and an amended petition on July 6, 1942 (R. 21–62). He attacked the legality of his detention on numerous constitutional grounds, claiming that he had not been accorded due process of law in that the deportation order was not supported by substantial evidence (R. 8–10, 53–58) and he had not been given a fair hearing (R. 43–53); that he had been subjected to double jeopardy (R. 11, 39–41); that the 1940 amendment to the deportation statute constituted as to him an *ex post facto* law (R. 11, 41); that he had been denied the equal protection of the laws in that he had been singled out and subjected to discriminatory treatment (R. 12, 28–36); and that the 1940 amendment, providing as a ground for deportation past membership in the described organizations, was an unreasonable limitation of his right to freedom of speech (R. 41–42). Peti-

637102—45——2

tioner also asserted that, except for the question of his membership in the I. W. W., the issues in the present deportation proceeding were the same as those in the earlier proceeding before Dean Landis, and those issues having been determined in his favor in that proceeding, the doctrine of *res judicata,* or at least an analogous principle, was applicable (R. 11, 36–39). On February 8, 1943, the district court, in a lengthy opinion (R. 723–759), denied the petition and remanded petitioner to the custody of respondent.[10] On appeal to the Circuit Court of Appeals for the Ninth Circuit, the order of the district court was affirmed (R. 7810), by a vote of three of the five judges who heard the appeal. The dissenting judges thought that the conclusion that petitioner was a member of or affiliated with the Communist Party was arrived at through reliance upon incompetent evidence received in violation of relevant regulations designed to safeguard the rights of aliens (R. 7794–7809).

The evidence relevant to the findings of the Attorney General is summarized in the Argument, *infra,* p. 18 *et seq.*

[10] On March 3, 1943, petitioner was admitted to bail by the district court and execution of the order was stayed pending final determination of petitioner's appeal to the circuit court of appeals (R. 763). The mandate of the circuit court of appeals was stayed for three months from September 27, 1944 (R. 7813), and has been further stayed pending final disposition by this Court.

SUMMARY OF ARGUMENT

I

The deportation statute provides for the deportation of any alien who at the time of his entry into the United States or at any time thereafter has been a member of or affiliated with an organization that believes in, advises, advocates or teaches the overthrow of this Government by force or violence. Congress has entrusted enforcement of the statute to the Attorney General and has provided that his decision shall be final. The courts have no power to review his order, except insofar as they find that it has been issued without due process of law. If upon a fair hearing there is some evidence to sustain the findings of the Attorney General upon which the order rests, the requirements of due process have been satisfied. The record is amply sufficient to demonstrate the presence of the required quantum of proof as to each of the essential findings of the Attorney General.

A. The evidence is sufficient to support the finding that the Communist Party at all times material to the issues was an organization falling within the statutory description. This evidence consists of Party literature and of testimony of former members of the Party acquainted with its aims, teaching methods, and literature. From this evidence, a reasonable man could find that the Communist Party advocated the doctrine of over-

throwing the Government by force and violence. The stricter requirement, applied in a proceeding to set aside a judicial decree of naturalization, that the evidence be "clear, unequivocal, and convincing" is inapplicable in a proceeding for collateral review of a deportation order by writ of habeas corpus: *Schneiderman* v. *United States*, 320 U. S. 118, 125, 153–154.

B. Likewise, the evidence suffices to support an administrative finding that petitioner was a member of the Communist Party after entering the United States. The evidence in this respect consists of testimony and statements, by persons who were concededly acquainted with petitioner, that by words and conduct he had admitted his membership in the Communist Party. The evidence was competent in a deportation proceeding, and the only issues were issues of credibility, as to which the determination by the administrative officer is conclusive in a collateral judicial review.

C. The finding that the Marine Workers Industrial Union was a controlled subsidiary of the Communist Party and that the union advocated doctrines similar to those of the Party has the required evidentiary support. The union was shown to be chartered by the Trade Union Unity League, an organization which openly supported the Party's program and whose leading officials consisted of members of the Communist Party. There was evidence to show that the union itself was established by the Communist Party for revo-

lutionary ends, and that its officials were prominent members of the Communist Party.

D. That the evidence is sufficient to support the finding of petitioner's affiliation with the Communist Party and the Marine Workers Industrial Union is also plain. The term "affiliation" as used in the deportation statute manifestly means something less than membership, and affiliation may be proved circumstantially by such conduct as assisting in the enterprises of an organization, securing members for it, and taking part in meetings organized and directed by or on behalf of the organization. Measured by this standard affiliation was amply proved both as to the Communist Party and the Marine Workers Industrial Union. There was evidence to establish that petitioner was actively connected with a publication of the Marine Workers Industrial Union, and there were additional items of evidence which, while perhaps not separately establishing affiliation with the Communist Party, nevertheless formed a pattern more consistent than otherwise with the conclusion that petitioner followed a course of conduct as an affiliate of the Communist Party, rather than as a matter of chance coincidence. He was well acquainted with Communist Party officials, and worked closely with them. He actively induced seamen to join the Marine Workers Industrial Union and opposed the action of labor organizations in seeking to disavow Communist support.

II

Just as lack of evidentiary support for a deportation order may amount to a denial of due process which may be corrected by habeas corpus, so may procedural abuses also constitute a denial of due process. No such abuses were present here.

A. The institution of the present deportation proceeding against petitioner following the dismissal of an earlier deportation proceeding against him on a similar charge was not in violation of the constitutional prohibition against double jeopardy and the principle of *res adjudicata*. It is settled that a deportation proceeding, not being a criminal case, is not affected by the constitutional provision against double jeopardy. It is also settled that *res adjudicata* is inapplicable to alien exclusion and deportation proceedings by executive agencies. Nor is there any factual basis in the record to support an application of the principle of *res adjudicata*, since neither the issues nor the evidence were the same at the two deportation hearings against petitioner.

B. The constitutional prohibition against *ex post facto* or retrospective laws is likewise inapplicable in deportation proceedings, which are in no sense criminal in nature, but represent merely the exercise of a sovereign power of government to alter or terminate the conditions upon which it chooses to permit aliens to continue to remain.

C. There is no warrant for petitioner's assertion that deportation on the basis of affiliation with the Marine Workers Industrial Union denies him the equal protection of the laws. When in 1934 the Secretary of Labor rendered an advisory opinion to the effect that membership in the Marine Workers Industrial Union was not a basis for deportation, she could not, and did not purport to, bind her successors in the administration of the deportation statute, and the record in this proceeding negates the factual premise upon which her advisory opinion in 1934 was based. A law enforcing agency is not precluded from enforcing the law by the fact that it may have failed to perform its mandatory duty of enforcing the same law against others falling within it.

D. There was no impropriety in the action of the Attorney General in overruling the determination of his intermediate reviewing body without according petitioner an opportunity to present further written or oral argument. The administrative regulations governing the proceeding did not require further argument, and oral argument as such is not a denial of a fair hearing. The requirements of due process were fully satisfied by the fact that the Attorney General had before him at the time of his decision all material necessary to a complete understanding of petitioner's contentions.

III

We do not believe that any constitutional issue of free speech or assembly is raised by petitioner's deportation in this case. Decisions of this Court point clearly to the conclusion that the sovereign power both to exclude and to deport aliens is unaffected by considerations of the extent to which freedom of speech and assembly may in other contexts be constitutionally abridged. Congress in its discretion could have transmuted the substantive constitutional guarantees of the First and Fifth Amendments into legal rights conferred upon aliens lawfully resident in the country, but it has not chosen to do so, and the choice is legislative, not constitutional.

ARGUMENT

I

THE EVIDENCE, TESTED BY APPLICABLE STANDARDS, ADEQUATELY SUSTAINS THE FINDINGS OF THE ATTORNEY GENERAL

Introductory

To authorize the deportation order it was necessary to find that petitioner, at the time of or subsequent to his entry into the United States, was a member of or was affiliated with an organization of one of the classes described by the deportation statute, Appendix A, pp. 126–127, *infra*. The Attorney General found that both the Communist Party and the Marine Workers Indus-

trial Union were such organizations; that subsequent to his entry into the United States, petitioner had been both a member of and affiliated with the Communist Party; and that subsequent to his entry, he had also been affiliated with the Marine Workers Industrial Union. While we believe that each of the findings of the Attorney General has adequate evidentiary support, it is clear that under the deportation statute the deportation order would be valid even if less than all of those findings were held not to be adequately sustained by the evidence. Of course, the evidence must be sufficient with respect either to the finding that the Communist Party is an organization within the statutory description or to the finding that the Marine Workers Industrial Union is such an organization. However, since deportation follows from either membership or affiliation in any one such organization, it is sufficient that the evidence is adequate with respect either (a) to the findings that the Communist Party was an organization within the deportation statute, and that petitioner was either a member of or affiliated with the Communist Party, or (b) to the findings that the Marine Workers Industrial Union was such an organization, and that petitioner was affiliated with that union.

Under the controlling statute (Section 19 of the Act of February 5, 1917, as modified by Re-

organization Plan No. V, effective June 14, 1940, Appendix A, pp. 127–128, *infra*) the decision of the Attorney General, the administrative officer charged with the issuance of deportation orders, is final. However, it is well settled that though no direct review of such decisions may be had in the courts, a collateral review by way of habeas corpus may be secured to the extent of determining whether the proceeding so lacked the elements of a fair hearing that it can be said that the alien was deprived of due process of law. *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103; *Tisi* v. *Tod*, 264 U. S. 131; *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149; *Kwock Jan Fat* v. *White*, 253 U. S. 454; *Zakonaite* v. *Wolf*, 226 U. S. 272. In such a collateral review, the range of judicial inquiry is closely circumscribed; as this Court said in the *Vajtauer* case, 273 U. S. at 106:

> * * * Upon a collateral review in *habeas corpus* proceedings, it is sufficient that there was some evidence from which the conclusion of the administrative tribunal could be deduced and that it committed no error so flagrant as to convince a court of the essential unfairness of the trial.

And in the *Tisi* case, 264 U. S. at 133–134, it was said:

> * * * We do not discuss the evidence; because the correctness of the judgment of the lower court is not to be determined by enquiring whether the conclusion drawn by

> the Secretary of Labor from the evidence was correct or by deciding whether the evidence was such that, if introduced in a court of law, it would be held legally sufficient to prove the fact found. * * * mere error, even if it consists in finding an essential fact without adequate supporting evidence, is not a denial of due process of law."[11]

Nor need the evidence be such as would be technically competent in a court of law. *Tisi* v. *Tod, supra; Bugajewitz* v. *Adams,* 228 U. S. 585, 591; *Jung Yen Loy* v. *Cahill,* 81 F. 2d 809, 812 (C. C. A. 9); *Skeffington* v. *Katzeff,* 277 Fed. 129, 132 (C. C. A. 1); *Hays* v. *Hatges,* 94 F. 2d 67, 68 (C. C. A. 8); *Nicoli* v. *Briggs,* 83 F. 2d 375, 377 (C. C. A. 10). And, while the burden of proving the statutory requisites of deportation was upon the Government (*Palmer* v. *Ultimo,* 69 F. 2d 1 (C. C. A. 7), certiorari denied, 293 U. S. 570; *Werrmann* v. *Perkins,* 79 F. 2d 467, 469 (C. C. A. 7)), that requirement is to be read in the light of the established principle that questions as to the weight of evidence and the credibility of witnesses are "for the administrative officials and will not be reviewed by the courts unless the conduct of such officers reflect unfairness." *Jung Yen Loy* v. *Cahill,* 81 F. 2d 809, 812 (C. C. A. 9); *Lindsey*

[11] The omitted portion of the passage quoted in the text deals with the effect of lack of procedural due process upon the validity of the order, a matter which we treat *infra,* pp. 93–115.

v. *Dobra*, 62 F. 2d 116, 118 (C. C. A. 5), certiorari denied, 288 U. S. 606; *Tisi* v. *Tod*, *supra*.

We do not understand that the principles laid down by the foregoing cases have been modified in any way by this Court. Relying upon decisions under the National Labor Relations Act, petitioner asserts (Br. 31–32) that the issue of the sufficiency of the evidence to support a deportation order is to be determined in accordance with a rule formulated by this Court in cases involving direct review of findings of the National Labor Relations Board. Under the National Labor Relations Act the test was stated by this Court in *National Labor Relations Board* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 299–300, to be whether the evidence is "substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. * * * Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' *Consolidated Edison Co.* v. *National Labor Relations Board*, *supra*, p. 229, and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." But even if criteria relevant to the statutory form of judicial review provided

by the National Labor Relations Act are applicable with equal force to a collateral review confined to the issue of the presence or absence of due process of law, we believe that, judged by those criteria, there is substantial evidence to support the findings of the Attorney General essential to the validity of the deportation order.[12]

A. *The findings as to the Communist Party (Findings 3–6, R. 103–104).*—The Attorney General found that the Communist Party of the United States, from the time of its inception in 1919 to the date of his decision, May 28, 1942, was an organization (1) that believed in, advised, advocated, and taught the overthrow by force and violence of the Government of the United States; (2) that had written, circulated, distributed, printed, published, and displayed printed matter so advising, advocating, or teaching; (3) that had caused such printed matter to be written, circulated, distributed, printed, published, and displayed; and (4) that had such literature in its possession for the purpose of circulation, distribu-

[12] No reliance was placed by the courts below on the "mere scintilla of evidence" condemned by this Court as insufficient to sustain orders of the National Labor Relations Board. The district court concluded in express terms (R. 758) that the order for deportation was made "after a fair hearing on substantial evidence," and Judge Stephens, in his opinion in the court below on denial of petition for rehearing, pointed out specifically (R. 7812) that in both the majority and the concurring opinion in the latter court "the idea of the mere scintilla was never considered."

tion, publication, issue, and display.[13] Any one of these findings, if supported by evidence, is sufficient under the deportation statute to make membership in or affiliation with the Communist Party an adequate basis for deportation.

Petitioner offered no evidence at the hearing to controvert the Government's contention that the Communist Party was an organization within the description of the deportation statute, nor did the petition for a writ of certiorari challenge the sufficiency of the evidence in this respect. The petition did state (Pet. 8, footnote) that if certiorari should be granted petitioner would argue that the proof did not support the findings as to the Communist Party; but as we read his brief it seems doubtful that any such argument is seriously advanced.[14] Nevertheless, since the findings as to the Communist Party lie at the root of the Government's case, we deem it appropriate to state in some detail the more significant portions of the evidence supporting such findings. The evidence consists both of Party literature and of

[13] The Communist Party was dissolved at a national convention of the Party held on May 20, 1944. See petition of the Communist Political Association for leave to intervene in this Court, p. 5.

[14] The discussion at pages 92–97 of petitioner's brief, which comes nearest to the point, appears to be directed to the proposition that the Government failed to establish any such "clear and present danger" from membership in the Communist Party as would constitutionally justify the statute in its proposed application to petitioner. This argument is discussed *infra*, at pp. 115–125.

testimony of former members of the Party acquainted with its aims, teachings, methods, and literature.[15] It may be summarized as follows:

A 1919 Convention in Moscow, representing Communist Parties of eight countries, resulted in the so-called "Third International,"[16] dedi-

[15] These witnesses and their qualifications were as follows: Benjamin Gitlow, a member of the Communist Party from its inception in 1919 to 1929, a member of the Party's Central Executive Committee, General Secretary in 1929, and its candidate for vice-president of the United States in 1924 and 1928 (R. 811–812); Nat Honig, a Party member from 1927 to November 1939, in 1934 Party representative in Moscow to the Red International of Labor Unions, managing editor of the official Party publication on the West Coast, and author of several Party pamphlets (R. 2065, 2067, 2070, 2071); Howard Rushmore, a Party member from the fall of 1934 to December 1939 and during that period managing editor of the official organ of the Young Communist League, organizational secretary of the Party for Iowa, and on the staff of the Daily Worker, official Party publication (R. 1421–1425); and Farrell Schnering, a Party member from January 1930 to May 1930 and from June 1931 to December 1935 (R. 1200–1201), during those periods the Party's State Secretary for Wisconsin and a director of the Milwaukee Workers School, editor of the official publication of the Party for Wisconsin, and in 1934 candidate of the Party for Attorney General of Wisconsin (R. 1167, 1169, 1194, 1200). Judge Sears' summarization of the qualifications of these witnesses appears at pages 164–170 and 296–297 of the record.

The documentary evidence, insofar as it is relied on in the following statement, is described in Appendix B, *infra*, pp. 131–135.

[16] The "Third International" regards itself as the successor of the "First International," which was established at London in 1864 and adopted the "Communist Manifesto" of Marx and Engels (Gov. Ex. 91, R. 1031) for its program. The "Third International" repudiated the "Second International," established at Paris in 1889, as a renegade movement

cated to the creation of "a single World Party of the revolutionary proletariat" (Gov. Ex. 228, p. 8, R. 2089). A second World Congress in Moscow, in 1920, adopted the "Theses and Statutes of the Third (Communist) International" (Gov. Ex. 94, R. 1037). Fundamental tenets set forth therein are that the class struggle is entering the phase of civil war; that Communists can have no confidence in bourgeois laws and must everywhere create a parallel legal apparatus which at the decisive moment will assist the revolution; that Communist groups should be formed in every military organization to carry on persistent and systematic agitation and propaganda fomenting disloyalty; that where such agitation is unlawful it is nevertheless necessary to carry it on unlawfully; that for a Party to be affiliated with the Third International its program must be in accordance with the resolution of that body and approved by it (R. 1037–1046; Gov. Ex. 94, pp. 27–32; R. 1037); and that "The mass struggle means a whole system of developing demonstrations growing ever more acute in form, and logically leading to an uprising against the capitalistic order of Government" (Gov. Ex. 94, p. 47, R. 1037).

The Communist Party in the United States had its inception in 1919 (R. 818–820). From the beginning its aims and objectives "were the revo-

"undermined by opportunism and damaged by the treason of its leaders who have taken the side of the bourgeoisie" (Gov. Ex. 94, p. 4, R. 1037).

lutionary aims and objectives as outlined later by the Communist Internationale. that is. working for organizing the forces to overthrow the Government of the United States and to set up in its place a new form of Government to be known as the Dictatorship of the Proletariat, patterned after the form of the government of Soviet Russia" (R. 819). It became a section of the International, and adopted a program in conformity with the program and policies of the latter, declaring itself to be "the most revolutionary part of the working class" and that it would "systematically and persistently propagate the idea of the inevitability of and necessity for violent revolution and [would] prepare the workers for armed insurrection as the only means of overthrowing the capitalist state" (Gov. Ex. 98, pp. 1, 5, 6–7, R. 1060). Late in 1921 the "Workers Party of America" was formed as the organized expression of Communism in this country, and it continued to function as the American section of the Communist International when in 1923 that body ordered the dissolution of the Communist Party of America (Gov. Ex. 99, p. 484, R. 1061; Gov. Ex. 108, preface and p. 20, R. 1074; Gov. Ex. 109, p. 5, R. 1075; Gov. Ex. 111, p. 5, R. 1077; Gov. Ex. 112, pp. 5–6, R. 1077–1078; Gov. Ex. 135, p. 295, R. 1445; Gov. Ex. 164, p. 795, R. 1476). In 1925 the Workers Party officially took the name "Workers (Communist) Party, the American Section of the Communist International," and

declared its purpose to be the revolutionary overthrow of capitalism and the substitution therefor of a Soviet Government (Gov. Ex. 99, pp. 484–485, R. 1061; Gov. Ex. 104, pp. 26, 27, R. 1069; Gov. Ex. 135, p. 296, R. 1445). Since 1929 it was known as the "Communist Party of the U. S. A.," or simply as the "Communist Party" (R. 822–824; Gov. Ex. 135, pp. 296, 298, 300, R. 1445). To belong to the Party one had to agree to engage actively in its work and to subordinate one's self "to all the decisions of the Comintern and of the Party" (R. 823). A condition of membership was that the candidate "has reached the point where he understands that force and violence must be used to smash and destroy the capitalist Government" (R. 1186).

Government witness Gitlow testified that the interpretation currently placed by the Communist Party upon the "Manifesto" of Marx and Engels was that "in order to overthrow capitalism it is necessary to do it forcibly through a violent revolution" (R. 1032).[17] Use of the ballot by the Party, in order to get its "temporary demands" before the electorate, was regarded by it "as only

[17] In the pamphlet "Why Communism?" (Gov. Ex. 120, R. 1117), more than 60,000 copies of which were published and distributed by the Party in the single year of 1934 (R. 1496), it is stated (R. 1114–1115):

"The capitalist State is a glaring fact. It is flesh and blood of the capitalist system. It stands in the way of the workers' progress towards a new, free life. Can it be abolished by gradual transformation? Those who say it can are the staunchest supporters of the capitalist robbers and the

a make-shift at the best, and [as] only another means of building the influence and membership of the Communist Party" (R. 1989; also R. 1056). Lenin taught that "The replacement of the Bourgeois by the proletarian state is impossible without a violent revolution" (Gov. Ex. 182, pp. 19–20, R. 1486); that if the class struggle results in the sacrifice of "half a million or a million" lives, the sacrifice will be justified (Gov. Ex. 184, "A Letter to American Workers," by V. I. Lenin, p. 18, R. 1491). But a revolution "does not simply *happen;* it must be *made*" (Gov. Ex. 231, "What is Communism?" by Earl Browder, p. 125, R. 2093). To make a revolution "it is essential first that a majority of the workers (or at least a majority of the class-conscious, thinking, politically active workers) should fully understand the necessity for revolution and be ready to sacrifice their lives for it; secondly, that the ruling classes be in a state of governmental crisis which draws even the most backward masses into politics, * * * weakens the government, and makes it possible for the revolutionaries to overthrow it rapidly" (Gov. Ex. 183, pp. 43–44, R. 1490). The Communist Party conceived of itself

---

most active promoters of imperialist wars. Their theory is not harmless, indeed. It is a poisonous theory. It is a smoke screen behind which cruel capitalist exploitation is hiding.

"We Communists say that there is one way to abolish the capitalist State, and that is to smash it by force. To make Communism possible the workers must take hold of the State machinery of capitalism and destroy it."

as the General Staff to organize and direct the workers to this end and, by precipitating or taking advantage of a governmental crisis, to bring about a revolution and carry it to a successful conclusion (R. 1174–1175)." "Only the revolutionary party of the proletariat can serve as this General Staff. A working class without a revolutionary party is like an army without a General Staff. The Party is the Military Staff of the proletariat" (Gov. Ex. 183, p. 109, R. 1490)." It

---

[18] In the July 1929 issue of "The Communist" (Gov. Ex. 232, R. 2097), a magazine officially published and distributed by the Communist Party, the following passage appears (R. 2099):

"When a revolutionary situation is developing, as a result of war or from any other cause, the Party of the proletariat must lead a direct attack against the capitalist state. The slogans put forth must be of such a nature as to guide the movement in its development, which will take the form at first of mass strikes and armed demonstrations. In that stage there arises the question of arming of the working class and disarming the capitalist class. Finally the highest form of struggle is reached wherein it culminates in the general strike and a merging of large sections of the military forces and the workers for armed insurrection against the capitalist state power."

The foregoing is a portion of a quotation which is set forth more fully in the opinion of Circuit Judge Wilbur, with the comment that "it unquestionably constitutes evidence in support of the finding that the Communist Party advocates rebellion" (R. 7783–7785).

[19] The booklet containing this excerpt ("Foundations of Leninism") was first published in 1934. In the first printing there were 100,000 copies, and there was wide distribution of the booklet by the Communist Party (R. 1488). The January 1938 issue of "The Communist" listed it for distribution and reading (Gov. Ex. 145, R. 1483, 1484, 1488).

was the theory of the Communists that "history has cast them in the role of those particular people who are going to lead, guide and direct this armed uprising which they speak of as the revolution" (R. 1175).

This conception of itself appears to have been the basis of the Party's policy toward the trade union movement. Demands "for better conditions such as shorter hours, higher wages, more relief to the unemployed, and all of the other demands raised in the various struggles organized by or under the leadership of the Communist Party" were merely "temporary demands or aims, and they are brought forward solely for the purpose of increasing the membership of the Communist Party and establishing the Communist Party as the leader of the working class and its allies" (R. 1988). The same purpose lay behind the Party policy of fostering and engaging in strikes (R. 964). "In this warfare of the masses developing into a civil war, the guiding party of the proletariat must, as a general rule, secure every and all lawful positions, making them its auxiliaries in the revolutionary work, and subordinating such positions to the plans of the general campaign, that of the mass struggle" (Gov. Ex. 94, p. 47, R. 1037, 1047). The capture of labor union leadership was regarded as "vitally necessary" to "the ultimate victory of the revolutionary struggle" and was recognized by the Party as its "first and foremost task" (R. 960). It was regarded as "necessary * * *

to go to the whole length of any sacrifice, if need be, to resort to strategy and adroitness, illegal proceedings, reticence and subterfuge, to anything in order to penetrate into the Trade Unions, remain in them, and carry on Communist work inside them, at any cost" (Gov. Ex. 105, p. 50, R. 1070), for the reason that "ultimately, of course, if they [the Communists] control the trade unions, they control the economic lives of the country and if a revolutionary situation should develop they can use the trade unions very effectively to bring about a successful culmination of such revolution" (R. 836).[20]

The Party program contemplated that "where there are no labor unions the Party must take the initiative and form unions" (R. 965). It likewise contemplated the extension of the Party's influence among the unemployed, "in short, to build the revolution and to use, of course, the unem-

[20] According to the testimony of government witness Honig, the objective of the Communist Party regarding trade unions (R. 2131) "was either to utilize existing trade unions, such as the American Federation of Labor Unions, later on the CIO Unions when they came into being, or at various times to create unions in order to obtain a foothold in industries, particularly the basic industries, the heavy industries, such as steel, various mining industries, marine, textile, to obtain a foothold in those industries, and to set up nuclei groups of Communists in these industries to [sic] that when the time was considered right for a seizure of power by the Communist Party that they could already have the Communist Party groups in these industries, very active in these basic industries and, as a result, could move immediately to seize these industries."

ployed organizations" (R. 1184). Unemployed workers were taught that under the capitalist regime "there will be more and more millions of workers condemned to a relief standard of living"; that social insurance and freedom from unemployment in the Soviet Union were made possible only by the workers "having exercised their revolutionary power to overthrow capitalism in Russia and displace the capitalist government with the dictatorship of the proletariat"; and that the conclusion "that the American workers ought to draw was only until [sic] they had followed in the footsteps of the Russian workers and farmers would they be able to reach a solution for the problem of the worker on relief" (R. 1185–1186).

The two principal organizational devices which the Communist Party used in its program towards the trade unions were "fractions" and "front organizations." "Fractions" were described by government witness Gitlow as cells within trade unions which, by their unity of action and militancy, were able to elect candidates for office, direct union policies, and exert an influence disproportionate to their number (R. 838–840; see also R. 1109–1110, 1986). By exploiting grievances they were able to foment dissension and draw to themselves disgruntled elements. "Front organizations" were those whose true purpose of advancing the aims of the Communist Party was screened by ostensibly legitimate purposes (R. 836–837, 915–917, 1107–1112, 1176–1177; Gov. Ex. 120, p. 69,

R. 1117). Two such organizations were the Trade Union Educational League (T. U. E. L.) and its successor, the Trade Union Unity League (T. U. U. L.). These were American affiliates of the Red International of Labor Unions (R. I. L. U.), the international trade union organization of the Communist International, and were dominated by the Communist Party (R. 895, 1176–1181). The T. U. U. L., in addition to the "boring from within" strategy, emphasized the organization of previously unorganized workers into unions (Gov. Ex. 135, p. 218, R. 1445; Gov. Ex. 221, pp. 6–7, R. 2080). It announced that in the event of "an Imperialist War it will mobilize the workers to struggle against American imperialism and to transform this war into a class war against the capitalist system itself" (R. 2079). It became the central organization of a group of revolutionary unions which it chartered,[21] one of these being the Marine Workers Industrial Union (R. 1176–1181; Gov. Ex. 164, pp. 799, 810, R. 1476; Gov. Ex. 220, p. 31, R. 2074). The establishment of fractions and front organizations was regarded as work preparatory for "the time when the Communists believe they can seize power through revolution" (R. 842). For a similar purpose the Party conducted workers' schools, ostensibly as "non-political or-

[21] "The T. U. U. L. coordinates and binds all the revolutionary union forces into one united organization. • • • It is the American section of the Red International of Labor Unions" (R. 2078).

ganizations, interested only in the education of the masses" (R. 1167; see also R. 1118–1120, 2511–2518), but designed "to educate as many workers as possible to the Communist Party without their knowing it" (R. 1167) and to persuade them that there would be no solution of the problems of American workers until they, as the workers had done in Russia, "had destroyed root, stem and branch, and left no stone standing of the old order" (R. 1171). The Party also sent students to the Lenin School in Moscow, established by the Communist International for the purpose of training professional revolutionists (R. 862–864).

To prevent exclusion or expulsion of its members from labor unions and similar organizations used as "front organizations", the Party encouraged such members to conceal the fact of their membership (R. 829, 840–841, 861, 926–928, 933–934, 1454–1456, 2132–2133; Gov. Ex. 9, pp. 2–3, R. 843; Gov. Ex. 15, p. 3, R. 859; Gov. Ex. 20, p. 1, R. 876). This was deemed especially important in the case of government employees, labor leaders, and teachers, whose known membership might cause loss of employment or of influence (R. 841, 927). It was a part of the Party's self-styled "policy of hypocrisy and deceit" (R. 928), which also included the giving of false testimony in "capitalist" courts (R. 927–929, 1156–1157, 1456, 2132–2133). In line with this policy, according to government witness Rushmore, the "Com-

munists decided at the Communist International Convention at Moscow in 1935 that their old tactics weren't getting them very far" (R. 1461), and consequently adopted a self-styled "Trojan horse" policy whereby they "watered down the more revolutionary aspects of their program; at least temporarily" (R. 1472) and "even soft pedaled their attacks on religion" (R. 1462). Rushmore testified that, notwithstanding this change of policy, the Party never abandoned the basic technique and principles on which it was founded, and continued to circulate literature advising the overthrow of the Government by force and violence (R. 1484–1498). Government witness Gitlow likewise so testified (R. 1088–1089).

We submit that the foregoing evidence fully supports the Attorney General's finding that the Communist Party from its inception in 1919 until the date of his decision believed in, advised, advocated, and taught the overthrow by force and violence of the Government of the United States. Administrative findings to this effect have been before the courts many times, and when based on comparable records have, without exception so far as we have been able to discover, been uniformly sustained.[22]

---

[22] *Kenmotsu* v. *Nagle*, 44 F. 2d 953, 954–955 (C. C. A. 9), certiorari denied, 283 U. S. 832; *Saksagansky* v. *Weedin*, 53 F. 2d 13, 16 (C. C. A. 9); *Wolck* v. *Weedin*, 58 F. 2d 928, 929 (C. C. A. 9); *Sormunen* v. *Nagle*, 59 F. 2d 398, 399 (C. C. A. 9); *Branch* v. *Cahill*, 88 F. 2d 545, 546 (C. C. A. 9); *Skeffington* v. *Katzeff*, 277 Fed. 129, 131 (C. C. A. 1); *Berkman* v. *Tillinghast*, 58 F. 2d 621, 622–623 (C. C. A. 1);

As stated in *Skeffington* v. *Katzeff*, 277 Fed. 129, 133 (C. C. A. 1), "it would be going far afield to say that, from such statements of purpose, no reasonable man could reach the conclusion that

In re Saderquist, 11 F. Supp. 525, 526–527 (D. Me.), affirmed *sub nom. Sorquist* v. *Ward*, 83 F. 2d 890 (C. C. A. 1); *United States* v. *Curran*, 11 F. 2d 683, 685 (C. C. A. 2), certiorari denied *sub nom. Vojnovic* v. *Curran*, 271 U. S. 683; *United States* v. *Smith*, 2 F. 2d 90, 91 (W. D. N. Y.); *United States ex rel. Abern* v. *Wallis*, 268 Fed. 413, 414 (S. D. N. Y.); *Antolish* v. *Paul*, 283 Fed. 957, 959 (C. C. A. 7); cf. *Rex* v. *Buck* (1932), 3 D. L. R. 97 (Ont. Ct. App., 1932); *Re Worozcyt et al.*, 58 Can. Cr. Cas. 161 (Sup. Ct. Nova Scotia, 1932). It is unnecessary to rely upon those additional cases which go to the extent of holding that the Communist Party as a matter of law will be presumed to advocate force and violence even in the absence of specific evidence. *Murdoch* v. *Clark*, 53 F. 2d 155, 157 (C. C. A. 1); *United States ex rel. Yokinen* v. *Commissioner*, 57 F. 2d 707 (C. C. A. 2), certiorari denied, 287 U. S. 607; *United States ex rel. Fernandas* v. *Commissioner of Immigration*, 65 F. 2d 593 (C. C. A. 2); *United States* v. *Perkins*, 79 F. 2d 533 (C. C. A. 2); *United States* v. *Reimer*, 79 F. 2d 315, 316 (C. C. A. 2); *United States ex rel. Fortmueller* v. *Commissioner of Immigration*, 14 F. Supp. 484, 487 (S. D. N. Y.); *Ungar* v. *Seaman*, 4 F. 2d 80, 81 (C. C. A. 8); *Ex parte Jurgans*, 17 F. 2d 507, 511 (D. Minn.), affirmed, 25 F. 2d 35 (C. C. A. 8). Of the three cases mentioned in the opinion in *Schneiderman* v. *United States*, 320 U. S. 118, at 148, fn. 30, as holding to the contrary, one—*Colyer* v. *Skeffington*, 265 Fed. 17 (D. Mass.)—was, as there noted, reversed on appeal *sub nom. Skeffington* v. *Katzeff*, 277 Fed. 129 (C. C. A. 1); and one—*Strecker* v. *Kessler*, 95 F. 2d 976 (C. C. A. 5)—was affirmed by this Court, with modification, on other grounds, and without consideration of this point. 307 U. S. 22. In the third, *Ex parte Fierstein*, 41 F. 2d 53 (C. C. A. 9), the only evidence adduced in support of the finding was the bare statement of the arresting detective that the Party did so advocate.

force and violence are the necessary instrumentalities for its accomplishment and are contemplated, and that, if consummated, it would overthrow government as now instituted." This Court's decision in the *Schneiderman* case furnishes no support for a contrary view. There the Court was dealing with a proceeding to set aside a judicial decree of naturalization. Such a proceeding, the Court held, was analogous to the setting aside of a public grant of land, for the purpose of which "the evidence must be 'clear, unequivocal, and convincing'—'it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt'" (320 U. S. at 125). Cf. *Baumgartner* v. *United States*, 322 U. S. 665, 670. The distinction between the criteria applicable to such a case and those applicable in habeas corpus proceedings to test the validity of deportation orders was clearly recognized by the Court in the *Schneiderman* case itself:

> * * * On varying records in deportation proceedings some courts have held that administrative findings that the [Communist] Party did so advocate [the overthrow of the Government by force and violence] were not so wanting in evidential support as to amount to a denial of due process, others have held to the contrary on different records, and some seem to have taken the position that they will judicially notice that force and violence is a Party principle. This Court has never

> passed upon the question whether the Party does so advocate, and it is unnecessary for us to do so now.
>
> * * * * *
>
> The bombastic excerpts set forth in Notes 35 to 38 inclusive, upon which the Government particularly relies, lend considerable support to the charge. We do not say that a reasonable man could not possibly have found, as the district court did, that the Communist Party in 1927 actively urged the overthrow of the Government by force and violence. But that is not the issue here. We are not concerned with the question whether a reasonable man might so conclude, nor with the narrow issue whether administrative findings to that effect are so lacking in evidentiary support as to amount to a denial of due process. * * *[23]

In view of the difference in issues, the *Schneiderman* case would thus not be controlling even had the Court there determined, for purposes of the case then before it, that the Communist Party did not advocate the overthrow of the Government by force and violence. But the Court made no such determination; rather, it intimated that the evidence then before it could properly have been held sufficient to sustain a contrary determination in a case involving administrative findings. Here we have such a case,

---

[23] 320 U. S. at 147–148, 153–154, footnotes omitted.

and more compelling evidence. The publications containing the four "bombastic excerpts" referred to in the foregoing quotation from the opinion in the *Schneiderman* case are all in evidence here,[24] as likewise are all the other significant documents which were introduced in the *Schneiderman* case on this issue. In addition, the record here contains a mass of similar material which, though not relied on in the *Schneiderman* case because published after the period which was there regarded as critical, is of unquestionable relevance in this proceeding.[25] On this record, which is certainly no less strong than that in the *Schneiderman* case, we do not believe that the propriety of the Attorney General's finding as to the aims of the Communist Party is open to the slightest question.

---

[24] "The Communist Manifesto", Lenin's "State and Revolution," the "Theses and Statutes of the Third (Communist) International;" and Stalin's "Foundations of Leninism" (Gov. Ex. 91, R. 1031–1032; Gov. Ex. 182, R. 1486; Gov. Ex. 91, R. 1036–1047; Gov. Ex. 183, R. 1488–1490). The title and translation of the last named work vary somewhat from those used in the edition referred to in the *Schneiderman* opinion (320 U. S. at 151, fn. 38), but the substance of the excerpts quoted by the Court will be found at pp. 53 and 103 of Gov. Ex. 183.

[25] For the convenience of the Court, we have set out in Appendix B *infra*, pp. 131–135, a brief description of each of the documents in the record which have been cited above as tending to establish the character of the Communist Party. Documents which were also introduced in the *Schneiderman* case are indicated in italics.

There can likewise be no doubt on the record that the Communist Party from its inception in the United States in 1919 until the date of the Attorney General's decision published and circulated, caused to be published and circulated, and had in its possession for the purpose of circulation, literature advising, advocating, and teaching the overthrow of the Government of the United States by force and violence. In substantial measure the record consists of such literature, circulated by the Party. The Presiding Inspector has summarized (R. 179–182), with sustaining exhibit and transcript references, the elaborate organization of the Communist Party's editing and publishing activities. As government witness Schnering testified: "The Party has a tremendous press. We used to brag that there was scarcely a language spoken in the country in which a Communist paper was not printed. They had many weekly papers; the Daily Worker which was the official publication of the Communist Party. They published many, many tons of pamphlets, books, through the Workers Library Publishers and the International Publishers. The Central Committee itself from time to time published pamphlets" (R. 1193). With respect to each of the government exhibits of Party literature, its Party sponsorship or approval and the fact of its distribution by the Party were brought out by the particular witness through whom the particular exhibit was intro-

duced.[26] The excerpts from such literature to which we have referred show it to be of an inflammatory character and of general application,

[26] Gitlow testified to the circulation and distribution by the Party of Government Exhibits 91 (R. 1030), 92 (R. 1033), 93 (R. 1035–1036), 94 (R. 1036, 1047), 95 (R. 1050–1051), 96 (R. 1057–1058), 97 (R. 1058–1059), 98 (R. 1059–1060), 99 (R. 1060–1061), 100 (R. 1061–1062), 101 (R. 1065–1066), 102 (R. 1066–1067), 103 (R. 1067–1068), 104 (R. 1068–1069), 105 (R. 1069–1070), 106 (R. 1071–1072), 107 (R. 1072–1073), 108 (R. 1073–1074), 109 (R. 1074–1075), 110 (R. 1075–1076), 111 (R. 1076–1077), 112 (R. 1077–1078), 113 (R. 1078–1079), 114 (R. 1079), 115 (R. 1079–1080), 116 (R. 1080–1084), 117 (R. 1084–1085), 118 (R. 1085–1086), and 119 (R. 1086–1087). Chase testified to the circulation and distribution by the Party of Government Exhibits 102 (R. 1115–1117), 120 (R. 1116–1117), and 121 (R. 1122–1123). Schnering testified to the circulation and distribution by the Party of Government Exhibits 122 (R. 1208–1209), 123 (R. 1209–1210), 124 (R. 1210–1211), 125 (R. 1211–1212), 126 (R. 1212–1213), 128 (R. 1214–1216), 129 (R. 1216–1219), 130 (R. 1219–1220), 131 (R. 1220), and 132 (R. 1220–1221). Rushmore testified to the circulation and distribution by the Party of Government Exhibits 136 (R. 1448–1449), 137 (R. 1449–1451), 139 (R. 1451–1452), 140 (R. 1457), 142, 143, 144 and 145 (R. 1459–1460), 146 (R. 1461–1462), 147 (R. 1462–1463), 148 (R. 1463–1464), 149–154 (R. 1464–1466), 155 (R. 1466–1467), 156 (R. 1468), 158 (R. 1472–1473), 159 (R. 1473–1474), 160 (R. 1474), 161 (R. 1474–1475), 162–165 (R. 1475–1476), 166–169 (R. 1476–1477), 170 (R. 1477–1478), 171 (R. 1478–1479), 172 (R. 1479), 173 (R. 1479–1480), 174 (R. 1480–1481), 175 (R. 1481–1482), 176 (R. 1482), 177–181 (R. 1484–1485), 182 (R. 1486), 183 (R. 1488–1490), 184 (R. 1491), 185 (R. 1492–1493), 186 (R. 1493), 187 (R. 1494–1495), 188 (R. 1495–1496), 189 (R. 1496–1497), 190 (R. 1499), 191 (R. 1499–1501), and 192 (R. 1501). Honig testified to the circulation and distribution by the Party of Government Exhibits 91–93 (R. 2126), 95 (R. 2127), 101 (R. 2128), 102

unmarked by any apparent distinction between advocating and predicting violence (cf. *Schneiderman* v. *United States*, fns. 40, 48, 320 U. S. at 153, 156). Taken in their ordinary sense they import the advising, advocating, and teaching of the forcible overthrow of the Government at an opportune time. Those to whom they were addressed could not reasonably have interpreted them as anything less than militant advocacy of this result. We submit that the findings of the Attorney General that the Communist Party was an organization within the description of the deportation statute are adequately supported by the evidence.

B. *The finding of petitioner's membership in the Communist Party (Finding 9, R. 104).*—There was adduced at the deportation hearings direct evidence of admissions by petitioner, by both words and conduct, of his membership in the Communist Party of the United States after his entry into the country. We outline below the more important of this evidence.

1. *The testimony of Lundeberg.*—Lundeberg, Secretary-Treasurer of the Sailors Union of the

(R. 2127), 105–107 (R. 2127–2128), 116 (R. 2129), 140 (R. 2129), 220 (R. 2073–2074), 221 (R. 2079–2080), 222 (R. 2082), 223 (R. 2082–2083), 225 (R. 2084–2085), 226 (R. 2087), 227 (R. 2088), 228–229 (R. 2089), 231 (R. 2092–2093), 232 (R. 2096–2097), 233 (R. 2108), 234 (R. 2109), 235 (R. 2113), 236 (R. 2113–2114), 237 (R. 2115), 238–240 (R. 2116–2117), 241 (R. 2117–2118), 242 (R. 2122–2123), and 243 (R. 2123–2124).

of the Pacific, head of the Seafarers International Union of North America, Vice President of the California State Federation of Labor, and in 1935 president of the Maritime Federation (R. 7260–7261), testified that in the summer of 1935 he was at petitioner's home through petitioner's invitation, having supper (R. 7264–7265); that among those present were Sam Darcy, an acknowledged Communist, to whom petitioner introduced the witness (R. 7265–7266), petitioner's wife, his secretary Norma Perry, and perhaps his daughter (R. 7335); and that Darcy, in petitioner's presence, asked Lundeberg to join the Communist Party, stating that petitioner was a member and that if Lundeberg joined the Party, it would build him up as a labor leader (R. 7266–7267). Lundeberg testified that petitioner then said: "You don't have to be afraid because nobody has to know you are a member of the Communist Party if you join" (R. 7267) and "You don't have to be afraid because I am one too" (R. 7268)—"Nothing to be afraid of; I am a member of the Communist Party" (R. 7339). Petitioner admitted that Lundeberg was at his home for dinner in the summer of 1935 (R. 7576) and that he was aware of Darcy's party membership (R. 6091–6092), but denied that Darcy was present at the time (R. 7576–7577) and that he had told Lundeberg that he (petitioner) was a member of the Communist Party (R. 7709–7710). He also

testified that his wife, another woman, and his two children were present (R. 7577).

Lundeberg's testimony of petitioner's admission would have been competent evidence in a court of law (*Beckwith* v. *Bean*, 98 U. S. 266, 280; *Harrison* v. *United States*, 42 F. 2d 736, 737 (C. C. A. 10); *Crouch* v. *United States*, 11 F. Supp. 232, 234 (N. D. W. Va.); *Union Mutual Life Ins. Co.* v. *Masten*, 3 Fed. 881, 885–886 (C. C. D. Ind.); cf. *Warszower* v. *United States*, 312 U. S. 342, 348); and, of course, is competent evidence in a deportation proceeding (*Chan Wong* v. *Nagle*, 17 F. 2d 987 (C. C. A. 9)). The question then is purely one of credibility—whether Lundeberg or petitioner was to be believed. On this question the determination made by the Attorney General is conclusive in a collateral judicial review unless Lundeberg's testimony was so inherently improbable that as a matter of law it is not entitled to credence. In this respect the power of the courts differs from the power of the Board of Immigration Appeals to review Judge Sears' recommended findings. The Board was entitled to draw its own conclusions from the evidence. Rule 90.11 of the Regulations of the Immigration and Naturalization Service (8 C. F. R., 1940 Supp., 90.11).[27] So, likewise, was the Attorney

[27] This rule provides that the Board may make an order less favorable to the alien than the order proposed by the presiding inspector if it believes that this should be done "after consideration of the record."

General entitled to draw his own conclusions from the evidence. Rule 90.12, *ibid.*, 8 C. F. R., 1940 Supp. 90.12, Appendix A, *infra*, p. 128.[28] But a court is not entitled to reject Lundeberg's testimony for the reasons relied upon by the Board of Immigration Appeals (R. 468–489), since those reasons provide no legal basis for rejection of such testimony by a tribunal that is not a trier of fact.[29]

---

[28] Review by the administrative officer charged with the issuance of deportation orders "is not confined to ascertaining whether there is any evidence to support the board; he exercises a power to examine the whole record and ascertain where the truth lies". *United States ex rel. Hom Yuen Jum v. Dunton*, 291 Fed. 905, 906 (S. D. N. Y.).

[29] The first of such reasons was Lundeberg's conceded bias as a rival labor leader whose relations with petitioner since October 1935 had been unfriendly (R. 475). But such bias was recognized and given full consideration by Judge Sears (R. 258) and the Attorney General (R. 91) in evaluating Lundeberg's testimony. A second reason relied upon by the Board of Immigration Appeals was its conclusion that Lundeberg's testimony included "three successive, growing versions of the conversation at Bridges' home" (R. 475), coupled with the fact that in three different interviews with government agents in the preceding six years he had stated that he had no information that petitioner was a Communist (R. 476–478, 7340–7349, 7367–7368). Lundeberg's testimony on direct examination as to the conversation with petitioner covers less than three pages of the record (R. 7266–7268), and it is inaccurate to describe as "the third version" (see Pet. Br. 49) the answers, consistent with each other, given within such a short space of time to questions that proceeded in normal course from the general to the specific. While some of the questions were leading, we think that the record shows that Lundeberg did not testify to petitioner's admission itself in response to leading questions. The previous statements of Lundeberg to government agents that he had no informa-

We submit that no portion of Lundeberg's testimony in any way calls for its rejection as a matter of law; and that the crediting of such testimony by the Attorney General must be deemed conclusive upon the courts. Moreover, it should be noted that Lundeberg's testimony is corroborated, as Judge Sears and the Attorney General recognized (R. 258–259, 91), by petitioner's failure to call as witnesses any of the other persons admittedly present at his home when the conversation occurred. None of these persons was shown to be unavailable. It is reasonable to assume that petitioner's wife and daughter, as well as Darcy and Norma Perry, petitioner's secretary, were readily available to him as witnesses. Whether petitioner's wife and daughter heard the particular conversation is immaterial; they at least were in a position to corroborate or deny petitioner's assertion that Darcy was not present at his house that evening. Under these circumstances, peti-

---

tion that petitioner was a Communist, were given due consideration by Judge Sears in evaluating Lundeberg's testimony (R. 257–258). As emphasized by the Attorney General (R. 92) and Judge Sears (R. 258), Lundeberg had been reluctant to testify against petitioner (R. 7340–7349, 7367–7368). Not until the night before taking the witness stand, when he was already under subpoena, did Lundeberg state to a government representative that petitioner was a Communist, and the statement then made was consistent with his testimony (R. 7340). As the Attorney General commented (R. 92), "anyone who is familiar with witnesses, and their reluctance to testify, as referred to by Judge Sears, knows that such a contradiction frequently occurs."

tioner's failure to call any of these persons as witnesses was properly considered by the Attorney General as an inference corroborative of Lundeberg's testimony. 2 Wigmore, *Evidence* (3d ed., 1940), Sec. 288; *United States* v. *Cotter*, 60 F. 2d 689, 692 (C. C. A. 2), certiorari denied, 287 U. S. 666; *Atchison, T. & S. F. Ry. Co.* v. *Phipps*, 125 Fed. 478, 482–483 (C. C. A. 8).

2. *The testimony of Kelley and Barlow.*—Government witness Kelley, proprietor of the Atwood Hotel in Seattle (R. 1917), testified that while petitioner was at the hotel on May 1, 1937 (R. 1917–1918), he heard one Dietrich say to petitioner at a conversation among the three in Dietrich's room: "Harry, you are one of the swellest guys I have ever known if it wasn't for the Commie outfit that you belong to." According to Kelley, petitioner replied: "That is all right. You will see the time that you are damned glad to belong to our outfit" (R. 1920). Kelley later asked Dietrich what he had meant and Dietrich replied: "It is the Communists. Didn't you know that Bridges belongs to that outfit?" (R. 1920–1921). Petitioner did not unequivocally deny having made the statement attributed to him. He testified that he doubted that he had made it, but that if he had it had not been made seriously (R. 5849–5851). Kelley testified that at the time he "never even gave it a second thought because [he] had no occasion to take it seriously and [he] paid no attention to it" (R. 1938).

Government witness Barlow testified that at a convention of the Maritime Federation of the Pacific in Seattle in 1935, petitioner told him "that the only way that a young fellow could get ahead in the labor movement today was to join the Communist Party" (R. 7377). Petitioner denied making this statement to Barlow (R. 7576).

With respect to the Kelley incident, since it did not impress the witness as serious at the time it occurred, Judge Sears recognized that if it stood alone it was "too equivocal to base a finding of membership or affiliation thereon" (R. 318). It shows, however, that petitioner, on another occasion than that to which Lundeberg testified, not only did not deny but acknowledged the attribution to him of membership in the Communist Party; and therefore the incident, the occurrence of which was not denied, has a corroborating significance in relation to Lundeberg's testimony. Of somewhat similar significance is the Barlow incident which, although denied by petitioner, Judge Sears and the Attorney General found took place (R. 272, 96).

3. *The testimony and prior statements of O'Neil.*—James O'Neil had been closely associated with petitioner from 1937 to 1939 as publicity director of the C. I. O. on the West Coast under petitioner's supervision, and had access to petitioner's office (R. 2993–2994). O'Neil had failed to answer two subpoenas calling for his attendance as a government witness at the hearing; and

he appeared only after he had been cited by a district judge for contempt (R. 2981–2982, 3078–3079). At the hearing the Government questioned him concerning a prior verbal statement he had allegedly made to the F. B. I. on October 7, 1940. O'Neil admitted that he was interviewed on October 7, 1940, but denied making certain remarks concerning petitioner which tended to show that petitioner was a member of the Communist Party (R. 3019–3024, 3076). He also testified that at an interview on April 22, 1941, at which Major Schofield, then Special Assistant to the Attorney General in charge of the Immigration and Naturalization Service (R. 5255), and Mr. Del Guercio, chief government counsel, were present, he told them that the statements he had made to the F. B. I. were true and also that what he told Schofield and Del Guercio on April 22 was true (R. 3032–3033, 3079–3081). He denied, however, having said that petitioner was a Communist or that he had seen him placing assessment stamps in a Communist Party book (R. 3036, 3051–3053).

Mrs. Segerstrom, a stenographer in the employ of the F. B. I., testified that she was present at O'Neil's interview on October 7, 1940, and that he dictated a statement which she took down stenographically (R. 3102–3104). She read her stenographic notes of the statement (R. 3104–3113, 3145) and in them appeared the following remarks of O'Neil (R. 3109–3110, 3113):

On another occasion I walked into Bridges' office, it always being my privilege to do so after first having assured myself that he was alone, and there on his desk was a new Party book, which had just been issued and into which Bridges was puttting assessment stamps. This was about two o'clock in the afternoon in Bridges' office in the Balboa Building, 593 Market Street, Room 509, in 1937. I expressed amazement that he was doing this openly with the book in plain view on top of his desk. However, he nonchalantly continued to put the stamps in place and then returned the book to his pocket. I knew this was a Communist Party book because I had one myself and it was just like it. It was the general practice to pay your dues to the Communist Party dues collector and, in return, to receive stamps which he tore off from a block and which you inserted in your book at your leisure. There is no doubt in my mind but what that was Bridges' membership book in the Communist Party.

* * * * *

On several occasions Bridges reminded me that I had not been attending Party meetings * * *.

* * * * *

* * * Bridges said that fraction meetings had been conducted in the room [in the Multnomah Hotel at which he stayed during a Maritime Federation Convention at Portland, Oregon, in 1937] * * *. By this

he meant top fraction meetings of the Communist Party.

Major Schofield testified that at the interview with O'Neil on April 22, 1941, O'Neil stated that he had seen petitioner "pasting dues stamps in Bridges' membership book in the Communist Party" (R. 5255–5256). Petitioner denied that he ever told O'Neil that he had participated in Communist Party fraction meetings or that he had called to O'Neil's attention that O'Neil had not been attending such meetings (R. 5882–5883).

Judge Sears accepted the statement of O'Neil as affirmative evidence of petitioner's membership in the Communist Party, although he recognized that it was hearsay and had not been made under oath, stating as to the one objection that "the sanction of cross-examination was present," and stating as to the other objection that there was "something equivalent" to an oath since O'Neil testified that he had told the truth in his interview with the F. B. I. and in the interview at which Major Schofield was present (R. 268–271). The Board of Immigration Appeals held that while the O'Neil statements were admissible for purposes of impeachment, they could not be considered as affirmative probative evidence. It also stated that the fundamental requirements of a fair hearing required their exclusion in that they had been received in violation of the regulations of the Immigration and Naturalization Service governing the reception of evidence at deportation hearings

(Rule 150.1 (c), 8 C. F. R., 1941 Supp., 150.1 (c) and Rule 150.6 (i), 8 C. F. R., 1941 Supp., 150.6 (i), Appendix A, *infra*, pp. 128–129, 130) (R. 446–451).[30]

The Attorney General agreed with Judge Sears. With respect to the asserted violation of the regulations, he said: "No objection having been raised by the alien throughout the hearing, * * * he waived the right to object on the technical ground that the statement was not taken in accordance with the rules" (R. 95–96). Likewise, the Attorney General was in accord with Judge Sears' finding that O'Neil's statements were credible (R. 96). For these reasons, he accepted the statements as substantive proof of petitioner's membership in the Communist Party. We submit that he was justified in so doing.[31]

O'Neil's testimony on the witness stand was in direct contradiction of the prior statements. He testified that he had made prior statements on the occasions in question, and that in them he had told the truth (R. 3080–3081), but denied that the statements in evidence represented what he had said (R. 3001–3073). The fact that prior statements were made is thus supported by the oaths of Segerstrom, Schofield, and O'Neil himself; and

[30] These regulations were not considered by Judge Sears, since they had not been called to his attention (R. 451).

[31] For reasons of convenience we treat the question at this point, although it might equally appropriately be considered in our subsequent discussion of petitioner's contention that he was denied a fair hearing by reason of alleged procedural abuses, *infra*, pp. 93–115.

that the statements in evidence represent what he said is supported by the oaths of Segerstrom and Schofield as well as by Segerstrom's original stenographic notes (Gov. Ex. 256, R. 3145). On the record we submit that there can be no doubt that the Attorney General was entitled to conclude that O'Neil made the statements attributed to him, as had similarly been found also by Judge Sears and the Board of Immigration Appeals (R. 92–94, 269–271, 443). The question thus presented is whether the fact of their acceptance by the Attorney General as substantive evidence bearing on the issue of petitioner's membership in the Communist Party constitutes a denial of a fair hearing.

We submit that there is no basis for the contention that prior statements of a witness contradictory of his testimony on the stand are not properly admissible for their substantive worth in an administrative proceeding of this character. That such statements are admissible in strictly judicial proceedings for impeachment purposes is well settled. *Walker* v. *United States,* 104 F. 2d 465, 470 (C. C. A. 4); *United States* v. *Graham,* 102 F. 2d 436, 441 (C. C. A. 2), certiorari denied, 307 U. S. 643; *United States* v. *Block,* 88 F. 2d 618, 620 (C. C. A. 2), certiorari denied, 301 U. S. 690; *London Guarantee & Accident Co.* v. *Woelfle,* 83 F. 2d 325, 333 (C. C. A. 8); *Curtis* v. *United States,* 67 F. 2d 943, 946 (C. C. A. 10); *Di Carlo* v. *United States,* 6 F. 2d 364, 368

(C. C. A. 2), certiorari denied, 268 U. S. 706. In administrative proceedings they are admissible both for impeachment and for such affirmative evidentiary value as the trier of fact may assign to them. Thus the Circuit Court of Appeals for the Second Circuit, while rejecting such a statement for purposes of a criminal case on the ground that the court was "not free so to make over the law," pointed out that in other than criminal cases "such a statement would be accepted as evidence to be weighed against the retraction, and nobody would think it an injustice to make use of it." *United States* v. *Block, supra,* at 620. And in *Ng Kee Wong* v. *Corsi,* 65 F. 2d 564, 565 (C. C. A. 2), the court referred to the distinction between the use of prior contradictory statements for impeachment purposes and their use as substantive evidence as "an artificial doctrine" and refused to apply it to an alien exclusion proceeding, saying: "These administrative boards are not bound by common-law rules of evidence, and we see no reason why they should not be permitted to accept a witness' prior testimony as affirmative proof of the fact then asserted, provided it is thought worthy of credence."

The rule thus applied by the Second Circuit Court of Appeals has been recognized by other circuits in cases involving alien exclusion and deportation proceedings (*Maita* v. *Haff,* 116 F. 2d 337, 338 (C. C. A. 9); *Ex parte Wong Foo Gwong,* 50 F. 2d 360, 361 (C. C. A. 9); *Ex parte*

Ematsu Kishimoto, 32 F. 2d 991, 992 (C. C. A. 9); *Wong Wey* v. *Johnson*, 21 F. 2d 963, 964 (C. C. A. 1); *Moy Said Ching* v. *Tillinghast*, 21 F. 2d 810, 811 (C. C. A. 1); *Ghiggeri* v. *Nagle*, 19 F. 2d 875, 876 (C. C. A. 9); *Johnson* v. *Kock Shing*, 3 F. 2d 889, 890 (C. C. A. 1), certiorari denied, 269 U. S. 558), and petitioner cites no authority to the contrary.[32] Nor is it material to their admissibility that the prior statements may not have been made under oath.[33] That factor does not preclude their admission in judicial proceedings for impeachment purposes, even though the jury may well attribute to them significance beyond that of impeachment alone. "The possibility that the jury may accept as the truth the earlier statements in preference to those made upon the stand is indeed real, but we find no difficulty in it. If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are

[32] The cases cited at p. 43 of petitioner's brief, fn. 27, merely stand for the proposition that a deportation order cannot validly rest exclusively on unverified ex parte statements of persons who are not produced for cross-examination.

[33] See, e. g., *Chan Wong* v. *Nagle*, 17 F. 2d 987 (C. C. A. 9) (prior statements held admissible although it did not appear that they were made under oath); *Chew Toy* v. *Nagle*, 27 F. 2d 513, 514 (C. C. A. 9):

"The contention that the decision of the Secretary of Labor was unfair, because based on informal statements not taken under oath, and because the appellant's counsel had no opportunity prior to the decision on the appeal to meet the case made against the citizenship of Chew Young, is not sustainable."

none the less deciding from what they see and hear of that person and in court. There is no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in court." *Di Carlo* v. *United States*, 6 F. 2d 364, 368 (C. C. A. 2), certiorari denied, 268 U. S. 706. And since the fact that such statements are unsworn does not preclude their admission in judicial proceedings for the proper purpose of impeachment, it should have no greater bearing upon their admissibility for the broader purpose for which it has uniformly been held that they may be admitted in alien exclusion and deportation proceedings. In either case, their unsworn character is a factor going merely to their credibility. Cf. *Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 229–230; *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 863 (C. C. A. 2), certiorari denied, 304 U. S. 576; *National Labor Relations Board* v. *Service Wood Heel Co., Inc.*, 124 F. 2d 470 (C. C. A. 1).

Petitioner urges strongly (Br. 38–42) that in any event O'Neil's prior contradictory statements were inadmissible under the regulations of the Immigration and Naturalization Service because not in the form of "recorded statements"—that is, because not made under oath and because O'Neil was not requested to sign the statements which he made. Although this view of the regulations was accepted by the Board of Immigration

Appeals (R. 446–450), the district court (R. 754) and Circuit Judge Healy in his dissent in the court below (R. 7805), we believe that it is erroneous, and is based on a misinterpretation of the pertinent provisions. Rule 150.1 (c) (Appendix A, pp. 128–129, *infra*), it is true, provides that statements secured during an investigation "which are to be used as evidence" shall be made under oath and taken down in writing, and the person interrogated shall be asked to sign the statement. Viewed in its context and in the light of other provisions of the regulations, this requirement is, however, merely directory of the procedure to be followed during the course of an investigation prior to the issuance of a warrant, to the end that warrants shall not be issued unless "there is credible evidence reasonably establishing (1) that the person investigated is an alien, and (2) that he is subject to deportation." Rule 150.1 (b) (8 C. F. R., 1941 Supp., 150.1 (b)). No provision of the regulations specifies that statements other than the "recorded statements" contemplated by Rule 150.1 (c) shall be categorically deemed inadmissible upon a deportation hearing; and, indeed, the contrary affirmatively appears from Rule 150.6 (i) (Appendix A, p. 130, *infra*), which deals with the admissibility of statements at hearings as distinguished from investigations. That rule provides *inter alia* that an inspector's affidavit as to statements made to him may be used to show prior contradictory

statements by a witness at a hearing if the inspector is unavailable to testify in person—thereby clearly intimating that the inspector himself, if available, may testify as to prior contradictory statements made to him. Nor can it be assumed that under the rule the inspector may testify only as to prior "recorded statements" made in writing and under oath, for the same rule makes such "recorded statements" themselves admissible in evidence to show prior contradictory statements of a witness. Rule 150.6 (i) thus makes plain that, whatever limitations may be imposed upon the use, as evidence, of ex parte "recorded statements" and affidavits, no restriction was intended to be placed upon the use of sworn testimony in accordance with the ordinary rules applicable to deportation hearings. Under those ordinary rules, as we have shown, Major Schofield and Mrs. Segerstrom were fully competent to testify as to prior statements made to them by O'Neil in contradiction of his testimony on the stand; and the admissibility of their testimony can hardly be defeated by the fact that it was supported by a stenographic record contemporaneously taken and authenticated to the satisfaction of the Presiding Inspector.

We believe it clear, therefore, that no rule of the Service was violated in the admission of evidence as to prior contradictory statements of the witness O'Neil, either for impeachment purposes or as substantive evidence. Nor can it even be

said that petitioner suffered from the usual vice of hearsay testimony—lack of opportunity for cross-examination to test the truth of the statements admitted in evidence against him. O'Neil, Major Schofield, and Mrs. Segerstrom, the stenographer, were all present at the hearing and available for cross-examination. On the issue of whether the statements were made petitioner had, of course, no reason to cross-examine O'Neil, for his denial of the statements on direct examination afforded petitioner all he could have secured by the most rigid cross-examination. On that issue, however, petitioner not only had but freely exercised the privilege of cross-examining Major Schofield and Mrs. Segerstrom (R. 3116–3156, 5259–5281). Moreover, O'Neil was available for cross-examination as to all the circumstances attending the interviews which he admitted had taken place, and as to any factors which would bear upon the question whether at those interviews he had in fact made the statements attributed to him.

Accordingly, the question, as we see it, is solely whether on the entire record the probability that the prior statements were in fact made and if made were true in fact was so remote that acceptance of them as evidence constituted a denial of a fair hearing. Passing the fact that in any event the acceptance of inadmissible testimony in a deportation hearing does not render the hearing unfair if there is—as there was here—other cred-

ible evidence of the fact in issue (cf. *Seif* v. *Nagle*, 14 F. 2d 416, 417 (C. C. A. 9), certiorari denied, 273 U. S. 737), we submit that there was no such inherent improbability that the statements were made and were true as to require their rejection as a matter of law. That the statements were in fact made was found not only by the Presiding Inspector and the Attorney General, who believed them, but by the Board of Immigration Appeals, which disbelieved them (*supra*, p. 54); and since the issue rested solely on the proper resolution of a square conflict of testimony, the conclusion of the administrative agency should be accepted as final. As to their truth, they are certainly not inherently improbable. O'Neil testified to the closeness of his association with petitioner (R. 2993–2994), as did petitioner likewise (R. 6460), and on this record petitioner's membership in the Communist Party is not so improbable as to make it unlikely that O'Neil should have seen him pasting assessment stamps in a Party book. Nothing in logic or experience suggests that a reasonable mind must necessarily rebel under all circumstances at accepting the truth of a prior unsworn statement later denied under oath. Such acceptance as a matter of fact occurs when the trier of fact accepts the prior statements for impeachment purposes. *Di Carlo* v. *United States*, 6 F. 2d 364, 368 (C. C. A. 2), certiorari denied, 268 U. S. 706, *supra*, pp. 56–57; Sworn denials of prior truthful statements are all too common in

human experience. Moreover, the circumstances of the present case supply affirmative grounds for believing that the prior statements of O'Neil were true and his subsequent denials false. It is significant, as the Presiding Inspector pointed out (R. 268), that O'Neil insisted that what he said on the prior occasions was true, and that he was being misquoted, instead of admitting that he had deliberately made false statements on the prior occasions had that been the case. For had he done the latter, and given some plausible reason for making false statements on the prior occasions, there might be good reason for doubting the truth of the prior statements. But his insistence that he had never made such statements in the face of conclusive evidence that he had done so, coupled with the lengths to which he went to avoid taking the witness stand, properly indicated to Judge Sears and the Attorney General that such statements set forth the truth.

We therefore submit that there was adequate reason to believe the truth of such prior statements; that they are supported by normal guarantees of trustworthiness; that they are not to be excluded as substantive evidence unless this is required by some rule of law or policy stronger than the policy that the truth, as found by the trier of fact on entirely reasonable evidence, shall prevail; and that no such stronger rule or policy applies to this proceeding. It follows that the

prior statements of O'Neil properly constitute substantive evidence in the case.

4. *Supporting testimony.*—We treat at greater length, *infra*, pp. 87–93, the evidence of other witnesses—including evidence by petitioner himself—tending to support the conclusion that petitioner was affiliated with the Communist Party within the meaning of the deportation statute. However, we cannot pass unchallenged petitioner's effort to foster a misconception of the record upon which Judge Sears and the Attorney General relied in determining the issue of membership as distinct from affiliation.

The only direct evidence relied on, it is true, was that of Lundeberg and O'Neil's prior statements. Much other evidence, it is also true, was rejected by the Presiding Inspector as "untrustworthy, contradictory, or unreliable" (cf. R. 90). In the latter category may be included the evidence of Sam Diner, Nat Honig, Thomas Laurence, Maurice J. Cannalonga, Richard A. St. Clair, Robert Wilmot, and John Oliver Thompson (R. 295–6, 300, 302–3, 307–8, 310–311, 315, 317).[34]

On the other hand, it is far from true, as petitioner implies at pp. 13–14 of his brief, that all evidence save that of Lundeberg and O'Neil was

[34] With respect to the circumstances of the Madison Square Garden meeting, sought to be proved by government witnesses McCuistion and Innes, the Presiding Inspector made no finding either way because of an equal mistrust of the McCuistion-Innes version and the Bridges-Curran version (R. 286).

rejected by the Presiding Inspector as "untrustworthy, contradictory, or unreliable." No such comment can fairly be made on the testimony of Kelly and Barlow, outlined above (pp. 48–49). The evidence of the Lovelaces showed a meeting in their apartment at which petitioner sought advice from known non-union Communist Party members as to the contents of a telegram of instructions to be sent to his union. Attacks on their credibility failed, and their evidence was accepted by the Presiding Inspector as "important as evidence of the conduct of Bridges in dealing with Communists, especially nontrade union members," and as showing "a close association with Communists in line with other evidence as to Bridges' membership in or affiliation with the Communist Party" (R. 276). Rushmore, who testified as to petitioner's standing in the Party press, and as to his friendly attitude towards Party organizations, was accepted by the Presiding Inspector "as being forthright and as qualified to testify with regard to the matters disclosed by him" (R. 169). Attacks on the credibility and qualifications of J. Ezra Chase likewise failed (R. 166, 288, 323), and his testimony, with that of John S. Horn, was accepted as establishing petitioner's attendance at and participation in a meeting principally attended by Communists, at which petitioner made a speech laying down a "line for trade unionists, whatever their affiliation," which was parallel with the line

currently advocated by the Communist Party itself (R. 291–292).

We do not suggest that any one of these witnesses standing alone, or all of them together, could be taken to establish petitioner's membership in the Party. Neither the Presiding Inspector nor the Attorney General so took them; the former's comment "that the testimony of Chase and Horn falls short of establishing by itself Bridges' membership" (R. 291) would be equally applicable to each of the others. But each was a reliable, qualified witness, trustworthy and trusted to the extent of his testimony. Separately and together they throw light on issues in the evidence of Lundeberg and O'Neil which might otherwise more readily have been resolved in favor of petitioner. They are not, as petitioner proposes, to be totally disregarded merely because their credible testimony falls short, in itself, of establishing the ultimate fact in dispute. They strongly support the finding of that fact on the basis of the more direct evidence of the principal witnesses.

C. *The findings as to the Marine Workers Industrial Union (Findings 7–8, R. 104).*—The Attorney General found that the Marine Workers Industrial Union was a part of, and was dominated and controlled by, the Communist Party, and that it believed in, advised, advocated, and taught the overthrow by force and violence of the Government of the United States. Reference

has been made (*supra*, pp. 33–35) to the "boring from within" strategy of the Communist Party in relation to the labor movement, and to the Trade Union Educational League (T. U. E. L.) and the Trade Union Unity League (T. U. U. L.) as "front" organizations. The T. U. E. L. was formed in 1921 or 1922 "for the purpose of building up an opposition movement within the American Federation of Labor against the Gompers leadership" and thereby gaining control of the Federation to be used by the Communist Party for purposes of violent revolution (R. 839). The Communist International supplied the funds for getting the T. U. E. L. started (R. 925), and the latter was thereafter controlled, directed, and supplied with funds by the Communist Party (R. 841, 875). It published the "Labor Unity" Magazine, devoted to propaganda having the end in view "of building up a strong block within the unions dominated by the Communist Party" for the purpose of achieving eventually "the overthrow of the Government and the establishment of a dictatorship of the proletarians" (R. 875). In line with the "boring from within" strategy then followed, the T. U. E. L. concealed its objectives and purported to be purely an educational association (R. 1176).

The supplanting of the T. U. E. L. by the T. U. U. L. represented a partial change in strategy resulting from a factional fight within the Party. William Z. Foster and others associated

with him as the Central Committee of the Party felt that the American Federation of Labor was "committed to a policy of class collaboration" and that in any event it was insignificant in numbers in comparison with the vast number of unorganized workers, and would not provide "a sufficient mass base for operation" (R. 1177). They therefore contended "that it would be best to pursue a new policy, to build revolutionary unions in this country," and they "went forth to organize militant, revolutionary, industrial unions" (*ibid.*).[35] This resulted in the formation of the T. U. U. L.[36] The circumstances of its founding and its purposes are told in its own publica-

[35] Government witness Honig testified that the "chief reason" for the formation of the T. U. U. L. "was that it was felt in Moscow, in the Communist International and in the Red International of Labor Unions, that a situation was rapidly occurring where the formation of unions with a dire t revolutionary goal would be essential because, as you know, the Wall Street crash occurred in 1929, and unemployment started to increase, plants began to shut down, and they felt that now with this discontent, that this discontent would mount among the working class, and that was a good opportunity to form revolutionary unions to channelize that discontent" (R. 2102); and that another reason for its formation "was to find a trade union organization for the Communists who had been expelled from the A. F. of L. to belong to" (R. 2101).

[36] As pointed out by the Presiding Inspector (R. 204), the T. U. U. L. policy of emphasizing the organization of previously unorganized workers into revolutionary unions was not intended as an abandonment of the "boring from within" strategy in relation to established unions, but was designed to complement that strategy (Gov. Ex. 221, pp. 6–7, R. 2080; Gov. Ex. 135, p. 218, R. 1445).

tion, "The Trade Union Unity League, Affiliated to R. I. L. U., its Program, Structure, Methods, and History" (Gov. Ex. 220, R. 2073, 2077–2081), as follows:

> The new unionism sets itself a revolutionary goal. * * * The American working class must follow the path beaten out by the Russian workers. * * *
>
> * * * * *
>
> The national center of the revolutionary industrial movement in the United States is the Trade Union Unity League, organized in Cleveland, August 31, 1929. The T. U. U. L. coordinates and binds all the revolutionary union forces into one united organization. It leads and directs the general struggle of the new union movement. It is the American section of the Red International of Labor Unions.
>
> * * * * *
>
> The Trade Union Unity League fights militantly against the impending capitalist war and for the defense of the Soviet Union. * * * In the event of an Imperialist War it will mobilize the workers to struggle against American imperialism and to transform this war into a class war against the capitalist system itself. * * *
>
> * * * * *
>
> * * * Under the leadership of the R. I. L. U., it takes its place, shoulder to shoulder, with the revolutionary workers in the Soviet Union, in China, in Europe,

> in all countries in the world proletarian struggle against imperialism."

Like the T. U. E. L., the T. U. U. L. was dominated by the Communist Party and its governing committees (R. 1176–1181; Gov. Ex. 164, p. 809, R. 1476). Its National Committee was composed chiefly if not entirely of members of the Communist Party and it openly supported that Party's program (Gov. Ex. 135, pp. 218, 220, R. 1445; Gov. Ex. 221, p. 13, R. 2080). In turn the importance attached by the Party to the T. U. U. L. is shown, in the "Thesis and Resolutions from the Seventh National Convention of the Communist Party of U. S. A." (Gov. Ex. 129, R. 1216–1219), as follows (R. 1217):

> The most fundamental task of our Party in mass work is the building of the revolutionary unions of the Trade Union Unity League into broad mass organs of struggle. The recent communications of the Comintern and Profintern have again laid stress upon this elementary necessity. It is in this work that there lies the key to the development of our Party into a mass Communist Party.
>
> The Party must develop a keen sense of responsibility for the building of the revo-

[11] Government Exhibit 220 is one of the documents that the court in *Kjar* v. *Doak*, 61 F. 2d 566, 568 (C. C. A. 7) held to be "quite convincing of the fact that the Communist Party believes in and advocates the use of force and violence whenever and wherever sufficient power is present to accomplish the purpose."

lutionary unions. It must play the leading role in the Trade Union Unity League, not by substituting itself for the T. U. U. L. and actually taking over trade union functions, but by stimulating its entire membership through the fraction system to build the revolutionary unions, to support them in their activities and to give them correct political guidance. The only way the revolutionary unions can grow into powerful mass organs is by the most complete support of the Party. In successfully building the revolutionary unions the Party lays the best basis for its own recruitment and mass leadership.

One of the revolutionary unions chartered by the T. U. U. L. was the Marine Workers Industrial Union (R. 1181–1182, 2103–2104; Gov. Ex. 221, p. 8, R. 2080). It was established pursuant to orders from the Communist Party (R. 2531), for the purpose of "disseminating [its] propaganda, carrying on agitational work, organizing for the revolutionary end" (R. 2564).[38] The officials of

[38] Its constitution stated:

"Victory in this struggle [the revolutionary struggle of the whole working class against the capitalist system] can be won only by the most relentless, militant, and revolutionary struggle for the whole working class. * * * It [the M. W. I. U.] rejects and condemns the treacherous class-collaboration policy of the A. F. of L. which seeks to delude the workers into believing that it is possible for them to live 'in peace' with the capitalists" (R. 604).

See also the preamble in its membership book (Gov. Ex. 276; R. 3245–3252). Petitioner himself testified in the first

the M. W. I. U. were leading members of the Communist Party (R. 2104), and its affiliation with the T. U. U. L. was openly stated in its literature (R. 2233).

Petitioner relied at the hearing upon an advisory ruling of January 3, 1934, made by the Commissioner of Immigration and Naturalization and approved by the Assistant to the Secretary of Labor (Alien's Ex. 15, R. 3695–3696), to the effect that membership in the T. U. U. L. or the M. W. I. U. should not be used as the sole ground for the deportation of an alien. This ruling was based upon an opinion (R. 3689–3695) of the then Solicitor of the Department of Labor and also upon "assurance that the Trade Union Unity League has severed any affiliation it may have had with the International Labor Union" (R. 3695). Petitioner also relied upon a letter (Alien's Ex. 25) of December 19, 1934, from the Commissioner of Immigration and Naturalization to the Chief of Police of Phoenix, Arizona, stating (R. 5248–5249):

> With reference to the Trade Union Unity League and its former connection with the Red International labor unions, we have sworn statements in our files as to the

proceeding before Dean Landis that he was aware that the goal stated by the M. W. I. U. was the establishment of a "Revolutionary Workers Government," although he contended that he construed the union's aim as the securing of such a government "by democratic means" (R. 208–209, fn. 14; R. 3252).

motion adopted at a meeting of that organization in New York City on July 1, 1933 "to discontinue and sever the then existing affiliation with the Red International of Labor Unions, an international organization of trade unions, of the said Trade Union Unity League and of all its constituent parts and associated organizations." It appears that testimony to the same effect was given by Nathaniel Honig, then editor of "Labor Unity," in the case of Chatham Shoe Company v. Shoe Workers Industrial Union at the trial had before Mr. Justice Edward J. McGoldrick in Special Term, Part V, Supreme Court [of New York] on October 6, 1933.[39]

Petitioner apparently relies on these exhibits[40] as evidence in his favor with respect to the character of the T. U. U. L. and the Marine Workers Industrial Union, and as the foundation of his contention that deportation on the basis of his affiliation with the Marine Workers Industrial Union would be an illegal discrimination (Pet. Br. 18–19, 57, 72–73; see pp. 106–110, *infra*).

[39] The Presiding Inspector stated (R. 207): "A request was addressed to L. B. Schofield, head of the Immigration and Naturalization Service that he examine the files of his bureau for the documents or reports referred to in the letter. (Al. Ex. 25.) He reported that a search revealed no records relating to this matter." Tr. 4800–4808 [R. 5245–5254]."

[40] While admitting these exhibits for identification only (R. 3688, 5248), Judge Sears stated that he treated them "in the same manner as if they were actually in evidence" (R. 207).

But the alleged dissociation of the T. U. U. L. from the R. I. L. U., on which the advisory ruling was based and to which the letter of December 19, 1934, referred, was shown by evidence in the present case not to have occurred. Honig here testified that his testimony in the *Chatham Shoe* case was not that a dissociation had occurred, but merely that in 1933 the T. U. U. L. had ceased to acknowledge openly its affiliation with the R. I. L. U. (R. 2221–2222, 2233–2234).[41] As Judge Sears found (R. 206–207), Honig's testimony in the present proceeding is corroborated by the pamphlet "The Trade Union Unity League Today" (Gov Ex. 221), written by him and published by the T. U. U. L. in 1934 (R. 2079–2080). While making no mention of affiliation with the R. I. L. U., it enunciates substantially the same program as the earlier pamphlet, "The Trade Union Unity League, Its Program, Structure, Methods, and History" (Gov. Ex. 220, R. 2074), which had openly announced the affiliation of the T. U. U. L. with the R. I. L. U. The later pamphlet states, for example (R. 2081):

> The Trade Union Unity League * * * is based on the policy of class against class, and T. U. U. L. unions have come out in support of the revolutionary politi-

[41] The stenographic minutes of the trial before Justice McGoldrick were no longer in existence at the time of the hearing, and could not be produced to verify Honig's testimony as to what he had there said (R. 5246).

> cal class struggles led by the Communist Party, because this Party believes in the class struggle. * * * In Germany and Austria the futility of trying to overthrow the system of exploitation of the workers merely through parliamentary means has been shown.

Judge Sears and the Attorney General found that petitioner's affiliation with the Marine Workers Industrial Union commenced prior to the alleged dissociation of the T. U. U. L. from the Red International in July 1933 (R. 238–249), 85–90); and if this finding is sustained (for discussion see *infra*, pp. 77–87), it is immaterial whether such dissociation occurred or not. In any event, however, in view of the uncontradicted evidence as to the affiliation of the M. W. I. U. with the T. U. U. L. and, through it, with the Communist Party, as to the domination and control exercised by the latter, and as to the continuity in the program advocated, we submit that Findings 7 and 8 must be deemed conclusive that the Marine Workers Industrial Union at all times between its organization in 1930 and its dissolution in 1935 was an organization falling within the description of the deportation statute.

4. *The findings of petitioner's affiliation with the Communist Party and the Marine Workers Industrial Union (Findings 10–11, R. 104).*—The Attorney General found that after entering the United States petitioner had been affiliated with

the Communist Party and with the Marine Workers Industrial Union. Although these findings are separately supppрted by independent evidence, affiliation with the Marine Workers Industrial Union was tantamount to affiliation with the Communist Party, because of the latter's domination, control, and use of the union (see *supra*, pp. 34, 65–74).

The statute has not provided a comprehensive definition of affiliation. Section 1 (Appendix A, *infra*, pp. 126–127) specifies that:

> For the purpose of this section: * * * (2) the giving, loaning, or promising of money or anything of value to any organization, association, society, or group of the character above described shall constitute affiliation therewith; but nothing in this paragraph shall be taken as an exclusive definition of * * * affiliation.

The legislative history is not helpful,[42] and we must assume that Congress used the word in its ordinary sense.[43] In *United States* v. *Reimer*, 79 F. 2d 315, 317 (C. C. A. 2), it was held that to prove "affiliation" within the meaning of the statute, other than by the giving of money, it must be shown that the alien "has brought about a status of mutual recognition that he may be relied on to co-operate with the Communist Party on a

[42] See the discussion by Dean Landis at R. 512.

[43] *Woolford Realty Co.* v. *Rose*, 286 U. S. 319, 327; *United States* v. *Wurts*, 303 U. S. 414, 417.

fairly permanent basis." Of course, "affiliation" as such means something less than membership. *Kessler* v. *Strecker,* 307 U. S. 22, 30. In *Wolck* v. *Weedin,* 58 F. 2d 928, 930 (C. C. A. 9), it was observed that "the Standard Dictionary defines the term 'affiliate with' as 'to receive on friendly terms; to associate with; to be intimate with; to sympathize with; to consort with'; and Webster's New International Dictionary defines the term as 'to connect or associate one's self with' "; and it was held that the alien's "sympathy with the aims of the Communist Party and his desire to join that party when allowed to do so; his admission that he had been 'connected' therewith for about a year; his attendance at party meetings; his selling the party organ; his giving money to the Communist Party whenever he could afford it, even though it was only in small amounts—all of these things are, within the meaning of the statute above and particularly subsection (2) quoted, sufficient to establish Wolck's 'affiliation' with the Communist Party." See also *United States ex rel. Fernandas* v. *Commissioner of Immigration,* 65 F. 2d 593 (C. C. A. 2) ("regularly engaged with well-known Communists in their activities").

The views of Judge Sears as to affiliation seem to us correct: "Affiliation may doubtless be shown circumstantially. Assisting in the enterprises of an organization, securing members for it, taking part in meetings organized and directed by or on

behalf of the organization, would all tend to show affiliation" (R. 153). Measured by this standard, we submit that affiliation has been amply proved in relation both to the Communist Party and the Marine Workers Industrial Union.

1. *The "Waterfront Worker."*—Judge Sears found that the "Waterfront Worker," a mimeographed newspaper which circulated on the San Francisco waterfront between 1932 and 1936, was an instrument of the M. W. I. U. and the Communist Party; that petitioner was associated with it as one of its editors from December 1932 until its abandonment; and that this association "demonstrates his affiliation with both the M. W. I. U. and the Communist Party, if not actual membership in either, or both, of those organizations" (R. 249). The Board of Immigration Appeals found that petitioner's association with the "Waterfront Worker" did not commence until September 1933, and that during the period of his association it was not an organ of the M. W. I. U. or the Communist Party (R. 420). The Attorney General upheld Judge Sears' findings (R. 85–90), and we submit that those findings are adequately supported by the evidence.

The issues of the "Waterfront Worker" in evidence, and the policies therein expressed, disclose, we believe, its domination by the M. W. I. U. and the Communist Party. Four of the five issues of the paper published prior to September 15, 1933, expressly acknowledge the as-

sistance and cooperation of the M. W. I. U. (Gov. Exs. 204, R. 1592–1603, 1592; 205, R. 1621–1640, 1638; 247, R. 2576–2593, 2576; 280, R. 6142–6159, 6142). The September 15, 1933, issue and succeeding issues, however, did not make this acknowledgment (Gov. Exs. 248, R. 2595–2618; 249, R. 2618–2640; 250, R. 2641, 2655; 251, R. 2665, 2682; 281, R. 6180, 6194; 283, R. 6250, 6251, 6269; 285, R. 6279, 6302; 286, R. 6326, 6339). The June 1933 issue (Gov. Ex. 204) announced that the paper would send a delegate to the M. W. I. U. convention in New York (R. 1597); the first July 1933 issue (Gov. Ex. 205) stated that the next issue would contain a report of the M. W. I. U. convention (R. 1638) and announced a meeting "called by the Waterfront Worker in co-operation with the Marine Workers Industrial Union" (R. 1637); and the second July 1933 issue (Gov. Ex. 247) contained the promised report of the M. W. I. U. convention (R. 2590). The August 1933 issue (Gov. Ex. 280) published the M. W. I. U.'s proposed codes for longshoremen and seamen (R. 6142–6159). The September 1933 issue (Gov. Ex. 281), which petitioner admits was published under his editorship (R. 6179), described the M. W. I. U. as "the only organization leading the struggles for better conditions" (R. 6184) and praised its activities in promoting strikes in Baltimore and on the *S. S. Cornore* (R. 6182–6184).

The first address of the paper, 830 Market Street, was the headquarters of the Needle Trade

Workers Industrial Union, a T. U. U. L. affiliate (R. 1559–1561, 6222). The second address, 3740 19th Street, used from July 1933 to February 1934 (Gov. Ex. 247, R. 2582, 6224), was a building occupied by Walter Lambert, an admitted Communist, as assembly rooms of the Workers Ex-Service Men's League, of which he was Manager (Gov. Ex. 219, R. 2049). Petitioner knew at the time that Lambert was an official of the Communist Party (R. 6225).[44] The third address, P. O. Box 1158, was rented for the paper by Harry Glickshon, generally known as Harry Jackson, an admitted Communist and M. W. I. U. organizer closely associated with petitioner (Gov. Exs. 211, 212, R. 1911–1914; R. 6091–6092, 6204, 6231–6240).

The October 1933 issue of the paper (Gov. Ex. 283) advised its readers to vote for the candidates of the Communist Party in the municipal elections of San Francisco (R. 6256, 6270–6274). The paper continuously advised the reading of Communist literature. The March 22, 1934, issue (Gov. Ex. 285) urged reading of the Western Worker (R. 6282), which petitioner knew was a Communist paper (R. 6270), and the November

[44] Although not representing any union, Lambert was with petitioner at meetings of the San Francisco Central Labor Council, and at the hearing before Dean Landis petitioner testified that Lambert had more to do with trade union affairs than anyone else he knew and that he had had more contacts with Lambert than with anyone else (R. 6469–6470).

19, 1934, issue (Gov. Ex. 286) urged reading of both the Western Worker and the Daily Worker (R. 6336). The December 31, 1934, issue (Gov. Ex. 250) contained an advertisement urging workers to register for a course in "Fundamentals of Communism" at the San Francisco Workers School (R. 2652). The same issue sponsored, in celebration of the third anniversary of the "Waterfront Worker," a meeting at which the speaker was William F. Dunne, whom it described as "one of the foremost trade-union authorities in America" (R. 2643). Dunne was a member of the Central Executive Committee of the Communist Party (R. 1500); and in his pamphlet "The Great San Francisco General Strike"[43] (Gov. Ex. 191, R. 1501), published in 1934 by the Workers Library Publishers, he gave credit to the M. W. I. U. and petitioner for the calling of the strike and further stated (Gov. Ex. 191, p. 64): "Already in July 1932, under the leadership and guidance of the Party, there began the formation of the nucleus of the great struggle in the San Francisco port. Out of these first beginnings, which took the form of the publication of a longshore bulletin, there grew in the middle of 1933 a local of the I. L. A. in which the militant

[43] The January 28, 1935, issue of the "Waterfront Worker" recommended the reading of this pamphlet by "every worker," and stated that it "can be bought at 37 Grove Street [the Communist Party headquarters in San Francisco], or from the Western Worker salesmen on the Front every day" (R. 6320).

elements played a decisive role." The reference, of course, was to Bridges' union, the International Longshoremen's Association (cf. Pet. Br. 6).

At the 1939 hearing before Dean Landis, petitioner testified that there was "no start toward real organization [among longshoremen] until September 1932, when we started our waterfront paper" (R. 3231–3232); that "we had no set plan. All we used to say in the paper was 'to organize' " (R. 3232); that the paper had been running "maybe a month or two" when his group took it over (R. 3243); and that "we took it over around September or October 1932, or it was running then and we took it over later, I can't set the exact time" (R. 3242). He testified further at the 1939 hearing that the paper had previously been published by the M. W. I. U. (R. 3234); and that "we changed the name of who it was put out by" (R. 3235) to a "group of longshoremen," it not being advisable, for fear of employer discrimination, to make public the names of individual editors (R. 3236–3237).

At the instant hearing, petitioner testified on direct examination that the paper was started by the M. W. I. U. in January 1933 and was put out in the name of "a group of longshoremen with the cooperation of the M. W. I. U."; that his group did not take it over until September 1933, at which time they "changed the name of the people putting out the paper to a group of I. L. A. longshoremen"; and that the paper was out of busi-

ness for "three or four months" before his group revived it (R. 5761–5764). On cross-examination he testified that the "Waterfront Worker" was not started until June 1933 (R. 6133); that it was then put out by a group of "seamen-longshoremen" affiliated with the M. W. I. U. (R. 6134); that it went out of business around July 1933 [46] (R. 6133–6134); that it was out of business for around two months (R. 6136, 6138); and that his group did not "first conceive" the idea of taking it over until October 1933 (R. 6160–6161). When shown the September 1933 issue (Gov. Ex. 281) he admitted, however, that it was put out by his group (R. 6179).

Under the rule of *Kessler* v. *Strecker*, 307 U. S. 22, petitioner's affiliation with the Marine Workers Industrial Union could not have constituted an adequate basis for deportation in the earlier proceeding before Dean Landis, since that union went out of existence in 1935. As Judge Sears points out (R. 243), his findings as to the time at which petitioner's group took over the "Waterfront Worker" are in accord with petitioner's 1939 testimony, given at a time when there was less reason to disclaim association with the paper in its early stages. The discrepancies between petitioner's 1939 and 1941 versions, and the internal inconsistencies of the 1941 version,

[46] Two issues for July 1933 and one for August 1933 are in evidence (Gov. Ex. 205, R. 1621; Gov. Ex. 247, R. 2576; Gov. Ex. 280, R. 6142).

are far too great to justify saying, as did the Board of Immigration Appeals (R. 388), that an adequate explanation may be "predicated upon a slip of the tongue or the memory as to one item only—the year in which the change occurred." That petitioner told the truth in 1939 is strongly corroborated by the following circumstances:

(1) At the second hearing he testified that the first address used by his group in the publication of the paper was 830 Market Street in San Francisco (R. 6195–6196, 6222). This address appears on all the issues in evidence prior to the second July 1933 issue (Gov. Ex. 203, R. 1568; Gov. Ex. 204, R. 1598; Gov. Ex. 205, R. 1627), but beginning with the second July 1933 issue (Gov. Ex. 247), the address that appears is 3740 19th Street (R. 2582), which petitioner testified was the second address used by his group (R. 6224). His testimony as to the addresses used thus is consistent only with the fact of his having been connected with the paper prior to September 1933.

(2) As Judge Sears found (R. 244), the earlier issues of the paper are in complete harmony with petitioner's testimony at the 1939 hearing concerning the emphasis therein upon organization. They also reflect the progress of organization. The issue for February 1933 (Gov. Ex. 203) states (R. 1568): "This paper is issued by a group of longshoremen for longshoremen." The issue for June 1933 (Gov. Ex. 204) states on the masthead (R. 1592): "This paper is issued by a group of

organized longshoremen. We acknowledge the help given us by the M. W. I. U." [Italics supplied.] June 1933 is the month in which Local 38–79 of the International Longshoremen's Association was organized, and in which petitioner joined that union (R. 6339–6340). The first July 1933 issue (Gov. Ex. 205) states (R. 1622): "Like the rest of the stevedores we have signed up in the I. L. A."[47] The second July and August issues for 1933 (Gov. Exs. 247, 280) are full of discussion of the I. L. A.'s activities (R. 2584–2587, 2591–2592, 6142–6144, 6154–6156). This is inconsistent with petitioner's testimony at the 1941 hearing that the paper was published prior to September 1933 by a group of "seamen-longshoremen" and not until that month by a group of I. L. A. longshoremen (R. 6133–6134).

(3) As Judge Sears points out (R. 243–244), the numbering of the issues of the paper continues in the same consecutive series, with no break at the September 1933 issue; the subsequent issues reflect no substantial change in policy but, on the contrary, demonstrate "a striking continuity of program and policy, including an extremely cooperative attitude with regard to the M. W. I. U." There is no such gap in publication just prior to September 1933 as petitioner testified, at both

[47] Petitioner testified (R. 6137) that the use of the word "stevedores" in itself disproved the Government's contentions, since the word was not in good usage among true longshoremen.

hearings, had occurred prior to the taking over of the paper by his group.

The shortest period of time that petitioner placed upon the gap in publication prior to his group taking over was "around two months" (R. 6136, 6138) and the longest was "three or four months" (R. 5763). The Board of Immigration Appeals nevertheless found, from the fact that no issue of the paper is shown to have been published between the August 15 and September 15 issues, that there was a gap just prior to September 1933; and from this it found corroboration of petitioner's testimony that his group commenced publishing the paper at that time (R. 388–392). It bases this conclusion upon the premise that in July 1933 the paper was changed from a monthly to a semi-monthly basis. The only evidence in support of such a premise is that two issues were put out in July, and that the second July issue (Gov. Ex. 247) stated: "We will try to bring the waterfront worker out every two weeks" (R. 2582). Certainly this does not place the paper so definitely on a semi-monthly basis [45] that fail-

[45] The Table of Issues prepared by the Board (R. 390) indicates that prior to February 1934 there were only two occasions at the most on which two consecutive issues appeared less than a month apart. There were the two July 1933 issues, and possibly there was an issue not in evidence that appeared between September 15 and October 15. The latter possibility is based on the fact that the September 15 issue is numbered 10 and the October 18 issue is numbered 12. But the numbering from October to the following February indicates monthly issues.

ure to publish a September 1 issue can be regarded as a gap in publication or as a going-out of business such as petitioner testified had occurred (R. 6133–6134, 6136, 6138). The August 15 and September 15 issues are numbered consecutively, and the September 15 issue (Gov. Ex. 281, R. 6181-6194) contains not the slightest indication that it is a resumption of a previously abandoned publication, and not the slightest reference to or explanation of the absence of a September 1 issue. Even if we assume *arguendo* that the paper had been placed on a semi-monthly basis in July, the gap in publication would be but two weeks, rather than four weeks as found by the Board (R. 391), since no such gap could have begun until the date for publication of the September 1 issue had arrived. Such a gap of two weeks is hardly consistent with petitioner's testimony that the enterprise had been abandoned for from two to four months (R. 5763, 6136, 6138).

The Board further emphasized that in order to accept Judge Sears' finding it would be necessary "to assume that there was a separately numbered series of 'Waterfront Workers' published prior to December of 1932, although no issue in such a series was in evidence and no one testified that it ever existed" (R. 387). But petitioner himself testified at the 1939 hearing to the publication prior to December 1932 of the "Waterfront Worker" (R. 3231–3237); and at the 1941 hearing he testified to methods of publication by the

former group that are entirely consistent with the paper's prior publication in unnumbered issues at irregular intervals.[49] The lack of specific evidence of a prior separately numbered series thus is clearly not sufficient to justify rejection of Judge Sears' finding, approved by the Attorney General, as to the time at which petitioner became associated with the "Waterfront Worker."

We submit that the evidence fully sustains the findings of Judge Sears which were accepted by the Attorney General as to both the significance and the time of petitioner's association with the "Waterfront Worker."

2. *Further evidence of petitioner's affiliation with the Communist Party and the Marine Workers Industrial Union.*—There are additional items of evidence which, while perhaps not separately establishing affiliation with the Communist Party, nevertheless form a pattern "more consistent with the conclusion that the alien followed this course of conduct as an affiliate of the Communist Party, rather than as a matter of chance coincidence" (R. 100, 327).

At the time of the 1934 strike in San Francisco petitioner was already well acquainted with Harry Jackson, organizer for the M. W. I. U. (R. 3266–

[49] Petitioner testified that the former group consisted of men who "for a certain period of time, would be performing longshore work and, really speaking, longshoremen. But next week, or the next couple of weeks, they would be at sea again. They were not permanent resident longshoremen of the port" (R. 5761).

3268, 6091–6092, 6095–6097, 6203–6204),[50] and with Sam Darcy, secretary of the California District of the Communist Party (R. 6091–6092); and he worked closely with them. He was active in inducing seamen to join the M. W. I. U. and personally conducted groups of seamen to its headquarters for that purpose, although he was aware at the time that its goal was establishment of a revolutionary workers government (R. 3252, 6097–6098).[51] Against the opposition of various seamen's unions he unsuccessfully sought to secure the seating of M. W. I. U. delegates on the Joint Strike Committee in 1934 (R. 6347–6349).

Petitioner unsuccessfully opposed the adoption by the San Francisco Central Labor Council, on June 22, 1934, of a resolution repudiating "all Communist Organizations, especially the so-called Marine Workers Industrial Union" and denouncing the efforts of Communists "to inject themselves into an industrial conflict for the sole purpose of making converts to Communism" (R. 250, 6556–6560); and he notified Darcy before its adoption that it was contemplated (R. 6351–6352). He conferred with Darcy "quite a few" times during the 1934 strike (R. 6353–6354, 6358), and testified

[50] As noted *supra*, p. 79, it was Jackson who, under the name of Harry Glickshon, secured for the "Waterfront Worker" its third mailing address under the supervision of petitioner's group (R. 6231–6240).

[51] As noted *supra*, fn. 38, pp. 70–71, he asserted that he construed the union's aim as the securing of such a government "by democratic means" (R. 3252).

that "when we met with him we met with him as a representative of the Communist Party" (R. 6359). He continued to meet with him after the adoption of the resolution repudiating Communist organizations (R. 6360). By his own testimony he was in constant association with well-known Communists (R. 3266–3268, 6091–6092, 6095–6097, 6203–6204, 6353–6354, 6358–6360, 6377–6378, 6450, 6456–6482). Schneiderman, who succeeded Darcy as secretary of the California District of the Communist Party, conferred with him "ten or a dozen" times (R. 6457). It was either Lambert or Schneiderman who, at petitioner's request, introduced him to Earl Browder (R. 6456).

On December 16, 1936, petitioner admittedly addressed a meeting in Madison Square Garden in New York (R. 6443). The arrangements for the lease of the Garden for this occasion were made by David Leeds, the treasurer of the Communist Party for the New York District, who paid in advance the $3500 rental (R. 3488–3493).[32] In September 1937 petitioner admittedly addressed a meeting at 1210½ West Washington Boulevard.

[32] As noted above, fn. 34, p. 63, the Presiding Inspector refused to make findings as to the circumstances under which this meeting took place, due to mistrust of both the McCuistion-Innes testimony and the Bridges-Curran testimony as to petitioner's knowledge of the Communist character of the meeting (R. 286). However, this refusal was not designed to cast any reflection on the undisputed testimony that the meeting took place, that petitioner addressed it, and that the Communist Party paid the rental of the Garden.

in Los Angeles. Government witness Chase, who was at the time a member and organizer of the Upholsterers International Union and also a member of the Communist Party, was instructed by Lou Barron, organizer of the Trade Union Section of the Communist Party in Los Angeles (R. 1127–1128), to attend the meeting. Chase testified that there were twenty-five or thirty people present at the meeting, ten or fifteen of whom he knew to be Communists (R. 1129). Petitioner's own witness, Horn, who was also present at the meeting, described petitioner's speech as tinged with Communism (R. 3651–3652).[53]

Government witness Rushmore testified that at an interview with petitioner, petitioner praised the Youth Congress of the Young Communist League, which was dominated and controlled by the Communist Party (R. 1429–1434). Dawn Lovelace, supported by the signed statement of her deceased husband, both of whom were Communists but were not members of a trade union, testified that in August 1935 petitioner at their apartment, in their presence and the presence of two other Communist Party members, discussed the contents of a telegram which he proposed to send to an officer of his local union (R. 1949–1951, 1955–1967, 1990–1993, 2002–2003). Peti-

[53] The testimony of Chase and Horn, as well as that of Rushmore and the Lovelaces, is touched upon briefly, *supra*, pp. 63–65, in connection with the finding as to petitioner's membership in the Communist Party.

tioner, while admitting that he had been at the apartment, denied discussing the contents of the telegram (R. 5849). He testified that he would not discriminate against union men because of Communist membership (R. 6534–6537), and that he was strongly opposed to "the slander and the publicity that was going on in Los Angeles at that time * * * to the effect that the CIO was a Communist organization" (R. 6028).

No great weight is to be, or has been, attached to the testimony of seven additional witnesses, all of whom were members of the Communist Party, that petitioner had attended Communist meetings (R. 1545–1559, 1707–1711, 1789–1800, 2158–2167, 2333–2340, 2410–2417, 2520–2525; see *supra*, p. 63). Petitioner denied attending the meetings described by these witnesses (R. 5840–5841, 5843, 5845, 5853, 5868–5869, 5878, 6015, 6316, 6430). Judge Sears concluded that their evidence, for various reasons, did not establish petitioner's membership in or affiliation with the Communist Party (R. 292–317). The Attorney General stated that such evidence "taken as a whole * * * cannot, because of its volume, be completely disregarded" (R. 98).

Petitioner strongly protests (Br. 13–14, 74–75) the "weight" which he asserts the Attorney General thus gave to witnesses whose testimony had been rejected by Judge Sears as "untrustworthy, contradictory, or unreliable" (see R. 90). However, it is to be noted that in no instance did Judge

Sears find that the testimony to which the Attorney General referred was false. With respect to each of these witnesses except Cannalonga he found merely that the facts to which the witness testified were not established to his satisfaction by the greater weight of the evidence (R. 295–296, 300, 302, 311, 315, 317). With respect to Cannalonga he concluded that his testimony "is without value" (R. 307–308), but he did not find that even Cannalonga falsified in giving the testimony to which the Attorney General referred.[54] The Attorney General as an original trier of fact on the whole record (*United States ex rel. Hom Yuen Jum* v. *Dunton*, 291 Fed. 905, 906 (S. D. N. Y.)) was not required by the Presiding Inspector's findings to treat the testimony of these witnesses as devoid of any significance whatever to the Government's case. He could, we submit, have properly given it more significance than he did. As it was, he merely alluded to a fact that seems obvious, namely, that the testimony of these witnesses is so consistent with the pattern of petitioner's activities as shown by other evidence that it cannot all be deemed false by virtue of the fact alone that these witnesses may for one reason or another have been not entirely reliable. He based no finding upon such testimony, but gave it, at the most, a significance merely corroborative of

[54] The charges earlier made by petitioner as to misconduct of the Government's attorneys in respect of Cannalonga's testimony are totally without merit, and seem to have been abandoned. See fn. 55, p. 93, *infra*.

his conclusions based upon other evidence. This, we submit, he was fully entitled to do.

II

PETITIONER WAS NOT DENIED DUE PROCESS OF LAW BY REASON OF ALLEGED PROCEDURAL ABUSES

It is unquestionable that procedural abuses, like lack of evidentiary support, may justify the courts in habeas corpus proceedings in setting aside a deportation order as lacking in due process of law. *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 106; *Tisi* v. *Tod*, 264 U. S. 131, 133–134; cf. *Chin Yow* v. *United States*, 208 U. S. 8, 11–12. Petitioner enumerates at pp. 65–66 of his brief six asserted abuses[55] either arising out of the institution of the deportation proceeding or occurring in the course of it. Two of these—the action of the Presiding Inspector and the Attorney General in accepting as substantive evidence O'Neil's prior contradictory statements, and the action of the Attorney General

[55] Eight such asserted abuses were enumerated in the petition for certiorari (pp. 26–40), but petitioner now appears to have abandoned his contentions in respect of alleged illegal discrimination against him in the amendment of the statute and in respect of alleged misconduct of the Government's attorneys at the hearing. We refer to our memorandum in response to the petition (pp. 29, 31–32) for a statement of our views on these points. Petitioner's passing references (Br. 10–11, 66, 71, 79) to the amendment of the statute as being specifically directed against him rest on the unwarranted assumption that the views of a few individual Congressmen in favor of pending legislation represent the considered legislative purpose.

in giving "weight" to the testimony of seven allegedly discredited witnesses—have been fully dealt with under Point I of this brief (*supra*, pp. 49–63, 91–93), and will not be further considered here.

Of the remaining four supposed abuses, it is not clear that petitioner claims that any of them is of such a character as should by applicable standards be held to vitiate the deportation order. The question which petitioner seeks to raise is not what "may be said in a constitutional sense of each of these elements, singly", but rather "in sum, whether the Attorney General has accredited himself 'by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play'" (Pet. Br. 65–66). We believe, and shall argue below, that in none of the respects claimed was petitioner deprived of any right secured to him by the Constitution. If we are correct in this it follows, we submit, that the actions complained of cannot by a mere process of argumentative cumulation be erected into the statute of an unconstitutional invasion of petitioner's liberty.

A. *As to double jeopardy and res adjudicata.*—As set forth in the Statement, *supra*, pp. 3–5, the present deportation proceeding followed an earlier proceeding, instituted under the statute prior to its amendment in 1940. In that earlier proceeding, conducted before Dean James M. Landis as Trial Examiner, the issue, because of

this Court's decision in *Kessler* v. *Strecker*, 307 U. S. 22, had been limited to whether petitioner at the time of the issuance of the warrant [56] was a member of or affiliated with an organization within the meaning of the deportation statute—specifically, as disclosed at the hearing, the Communist Party of the United States. The conclusion of the Trial Examiner was that the evidence "establishes neither that Harry R. Bridges is a member of nor affiliated with the Communist Party of the United States" (R. 636). The institution of the present proceeding, under the amended statute, charging past as well as present membership in not only the Communist Party but also other organizations within the statute, is attacked as offensive both to the double jeopardy clause of the Fifth Amendment and to "the principles of res adjudicata" (Pet. Br. 66–70).[57]

It is clear, we submit, that the doctrine of double jeopardy does not furnish ground for judicial intervention in deportation proceedings. In *Helvering* v. *Mitchell*, 303 U. S. 391, this Court, in an opinion by Mr. Justice Brandeis, distinguished between remedial and penal sanctions, holding the defense of double jeopardy applicable only to the latter. In describing the

[56] See fn. 5, pp. 4–5, *supra*.

[57] It is not clear that petitioner rests upon the doctrine of *res adjudicata* as such: "The precise question here is not whether Dean Landis' findings and rulings were either correct or res adjudicata." Pet. Br. 68.

type of remedial sanction to which the opinion referred, the Court said (303 U. S. at 399):

> Remedial sanctions may be of varying types. One which is characteristically free of the punitive criminal element is revocation of a privilege voluntarily granted.

And by way of footnote illustration the Court added: "Typical of this class of sanctions is the deportation of aliens."

It may be observed that in *Helvering* v. *Mitchell, supra,* the Court was dealing with the imposition of both penal and remedial sanctions for the same act[58] rather than with what petitioner describes as "successive proceedings with respect to * * * identical matters" (Pet. Br. 68). But the inapplicability of the doctrine of double jeopardy to deportation proceedings does not spring from the rationale followed by Mr. Justice Frankfurter in his concurring opinion in *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537, 553–556, but rather from the intrinsic nature of deportation. In *Sire* v. *Berkshire,* 185 Fed. 967, 970–971 (W. D. Tex.), a deportation order was upheld against a claim of double jeopardy based upon a prior discharge after a hearing upon the same issues. The roots of the principle lie in the inherent power of a sovereign state

[58] Cf. *United States ex rel. Zapp* v. *District Director of Immigration, etc.,* 120 F. 2d 762 (C. C. A. 2), holding that deportation may lie notwithstanding the pendency of an indictment based upon essentially the same facts.

(*Tiaco* v. *Forbes*, 228 U. S. 549, 556) to refuse "to harbor persons whom it does not want" (*Bugajewitz* v. *Adams*, 228 U. S. 585, 591). As was said by the Court in *Fong Yue Ting* v. *United States*, 149 U. S. 698, at 709:

> * * * "Deportation" is the removal of an alien out of the country, simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent, or under those of the country to which he is taken.

And further, at 730:

> * * * The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property; without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures,

and cruel and unusual punishments, have no application.

This sovereign power of the Government through its legislative and executive arms to rid itself of those deemed inimical to the national welfare is not, we submit, to be restrained merely by the fact that at some previous time the same course may have been considered and, for whatever reason, abandoned.

Similar considerations, we believe, control the application of the doctrine of *res adjudicata*. It is well settled that *res adjudicata* is inapplicable to alien exclusion and deportation determinations by executive agencies. *Pearson* v. *Williams*, 202 U. S. 281 (where "the proceedings upon both inquiries * * * appear to have been before the same persons, upon the same question" (p. 282)); *Flynn ex rel. Ham Loy Wong* v. *Ward*, 95 F. 2d 742 (C. C. A. 1); *Mock Kee Song* v. *Cahill*, 94 F. 2d 975, 977 (C. C. A. 9); *Wong Chow Gin* v. *Cahill*, 79 F. 2d 854 (C. C. A. 9); *White* v. *Chan Wy Sheung*, 270 Fed. 764, 767 (C. C. A. 9); *Ex parte Stancampiano*, 161 Fed. 164, 165 (S. D. N. Y.). In a field appropriately subject to the complete control of Congress, and in which national interests are so vitally involved, we believe that it would not accord with sound public policy to hold that an alien, however undesirable he may be deemed, acquires a vested right to remain in the country by virtue of a previous determination which may have been erroneously reached or

based upon an inadequate development of the Government's case. Cf. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 145."

Moreover, petitioner's argument under this head rests on the faulty assumption that the two proceedings dealt with "identical matters" and involved the presentation of "essentially the same evidence"[60] (Pet. Br. 68, 65). We may concede that there was some community of issues between the two proceedings, in that establishment of petitioner's membership in or affiliation with the Communist Party as of the date of the warrant of arrest (or as of March 2, 1938, the date of the warrant of arrest in the first proceeding) would have called for an order of deportation in each instance. We may also concede that although past membership or affiliation was not in issue in the first proceeding the Government's case con-

[59] There the Court held (p. 139) that a judicial reversal of an administrative order "for reconsideration in accordance with the views expressed" does not preclude the agency from reconsidering the order from the standpoint of other relevant factors which in its judgment were not previously given adequate weight, saying (p. 145):

"* * * But an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge."

[60] Although we do not understand that diversity of the evidence presented in two proceedings on the same issue bars the principle of *res adjudicata*, it is worth remarking that no witness offered by the Government at the second hearing had testified at the first.

sisted essentially of an effort to show past membership which, it claimed, should be presumed, in the absence of evidence to the contrary, to continue down to the date of the warrant (cf. Pet. Br. 67, fn. 38, 68a). But Dean Landis scrupulously confined his ultimate finding to the existence of present, as distinguished from past, membership or affiliation; and his lengthy Findings and Conclusions (R. 495–654) contain no intimation that he necessarily adopted the Government's view of what would be sufficient to prove its case.[61]

The issues as to petitioner's past connections with the Communist Party were therefore not determined in the prior proceeding, even on a strict application of the doctrine of *res adjudicata*. In any event, it is clear that the issues with respect to petitioner's membership in or affiliation with the Marine Workers Industrial Union were not and could not have been presented at the first hearing. That union was dissolved in 1935, and membership in or affiliation with it could not have been an issue in a proceeding confined to petitioner's status as of March 2, 1938.[62] In this proceeding, how-

[61] At the most the presumption contended for by the Government is a mere permissible inference which the trier of fact is free to accept or reject as he sees fit. 9 Wigmore, *Evidence* (3d ed. 1940), sec. 2530; 2 Wigmore, *ibid.*, sec. 437.

[62] The irrelevance of the Marine Workers Industrial Union to the first proceeding is shown by Dean Landis' comment (R. 604) that it would be impossible on the record before him "to determine the communistic or noncommunistic character of the M. W. I. U.; nor is it necessary to do so."

ever, such membership and affiliation formed basic issues, independent of the issues of membership in or affiliation with the Communist Party (see p. 19, *supra*). The Attorney General's findings adverse to the petitioner on the issue of affiliation with the Marine Workers Industrial Union are, we submit, sufficient of themselves to sustain the order, irrespective of any supposed application of the doctrines of double jeopardy or *res adjudicata* to the proceeding.

B. *As to ex post facto or retrospective application of the statute as amended.*—Petitioner claims (Br. 70–71) that the present proceeding violates due process through its embodiment of the constitutional prohibition against *ex post facto* laws. He asserts that the deportation statute was amended on June 28, 1940, "with the specific purpose in mind of deporting Bridges upon grounds admittedly not then existing" (Br. 71).[63]

It is settled that the prohibition of *ex post facto* laws contained in Section 9 of Article I of the Constitution applies only to criminal laws,[64] and

[63] As noted above, fn. 55, p. 93, we do not understand petitioner now to contend that the amendment of the statute was an unconstitutional discrimination against him, nor do we regard as warranted his assumption that the amendment was adopted "with the specific purpose" of deporting him, except in the minds of individual articulate Congressmen.

[64] *Calder* v. *Bull*, 3 Dall. 386; *Johannessen* v. *United States*, 225 U. S. 227, 242. In this connection, petitioner cites (Pet. Br. 70, fn. 40) cases which involve the deprivation of fundamental rights as penalties for past criminal conduct. To

that deportation statutes are not such laws.[65] This was the answer made by this Court in *Mahler* v. *Eby*, 264 U. S. 32, 39. There the petitioners had been convicted in 1918 of violations of the Selective Service Act of May 18, 1917 (c. 15, 40 Stat. 76), and the Espionage Act of June 15, 1917 (c. 30, 40 Stat. 217). They were subsequently ordered deported by authority of the Act of May 10, 1920 (c. 174, 41 Stat. 593), which provided for the deportation of aliens who had been convicted under various statutes, including the Selective Service and Espionage Acts, if the Secretary of Labor, "after hearing, finds that such aliens are undesirable residents of the United States." To the argument that this increased the punishment for the previously committed criminal acts, thereby rendering the Act of 1920 an *ex post facto* law, this Court replied (264 U. S. at 39):

---

urge that these cases are applicable here is inconsistent with the intrinsic nature of the power of deportation. Whether petitioner was ever guilty of criminal conduct is entirely immaterial to this case.

[65] The cases holding that deportation proceedings are not criminal in character, and do not impose punishment for crime, are numerous. *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149, 154; *Bugajewitz* v. *Adams*, 228 U. S. 585, 591; *Hays* v. *Hatges*, 94 F. 2d 67, 68 (C. C. A. 8); *Nicoli* v. *Briggs*, 83 F. 2d 375, 377 (C. C. A. 10). This is true even though the basis for deportation also constitutes criminal conduct punishable as such in appropriate criminal proceedings. *Skeffington* v. *Katzeff*, 277 Fed. 129, 131 (C. C. A. 1); *United States ex rel. Zapp.* v. *District Director of Immigration, etc.*, 120 F. 2d 762, 764 (C. C. A. 2).

> * * * Congress by the Act of 1920 was not increasing the punishment for the crimes of which petitioners had been convicted, by requiring their deportation if found undesirable residents. It was, in the exercise of its unquestioned right, only seeking to rid the country of persons who had shown by their career that their continued presence here would not make for the safety or welfare of society.[66]

The same result necessarily follows in the present case, where deportation does not depend upon past conviction for crime (as it did in *Mahler* v. *Eby*) or upon whether the conduct relied upon was of a criminal character.[67] Whether such conduct was criminal or not is entirely irrelevant.

---

[66] Petitioner contends (Br. 70, fn. 40) that the language quoted from *Mahler* v. *Eby* is dicta. But *Mahler* v. *Eby* is, we submit, a direct holding on the point. Had the Court there accepted the petitioners' contention, they would have been entitled to discharge from custody. Instead, the Court directed that they not be discharged "until the Secretary of Labor shall have reasonable time in which to correct and perfect his finding on the evidence produced at the original hearing, if he finds it adequate, or to initiate another proceeding against them" (264 U. S. at 46). It follows that the *ex post facto* principle was held inapplicable. See also *Bugajewitz* v. *Adams*, 228 U. S. 585, 591.

[67] Where deportation is based upon conviction for crime, or upon criminal conduct as such, there is at least a more plausible basis than here for characterizing it as penal. Cf. *Wallis* v. *Tecchio*, 65 F. 2d 250 (C. C. A. 5). But even in such cases it is held not to be penal. *Mahler* v. *Eby*, 264 U. S. 32; *Skeffington* v. *Katzeff*, 277 Fed. 129, 131 (C. C. A. 1); *United States ex rel. Zapp* v. *District Director of Immigration, etc.*, 120 F. 2d 762, 764 (C. C. A. 2).

That being the case, there is no possible basis for the application of a principle confined in its scope to criminal proceedings or to penalties, as such, retroactively imposed for criminal conduct.

But petitioner contends that the *ex post facto* doctrine is only a phase of a broader principle, embodied in the due process clause of the Fifth Amendment, against retroactive legislation, and that the deportation statute as construed is violative of that broader principle. *Apropos* of such a contention, it has been said (*United States* v. *Sui Joy*, 240 Fed. 392, 394 (C. C. A. 9)):

> We are unable to assent to the proposition that Congress cannot authorize the deportation of an alien resident of the United States who became such at a time when there was no statutory condition as to his right to remain. It is now well settled that, while an alien who has acquired a residence in the country with the intention of remaining permanently is entitled to the same protection of life, liberty, and property as a citizen, he acquires no vested right to remain, and the government has the power to deport him if, in the judgment of Congress, the public interests so require.[68]

[68] In accord, see also *Skeffington* v. *Katzeff*, 277 Fed. 129, 131 (C. C. A. 1): "It is too well settled by the decisions of the Supreme Court of the United States to require any citation of authorities that an alien resident in the United States may be deported for any reason which Congress has determined will make his residence here inimical to the best interests of the government;" *Prentis* v. *Manoogian*, 16 F. 2d

The contention that an alien may not be deported except in accordance with the laws in existence at the time of his admission has been rejected as often as it has been advanced.[69] The Constitution contemplates no such limitation of sovereign power. Nor does it contemplate that Congress may not provide for deportation upon the basis of an act that was not a basis for deportation when done.[70] To hold otherwise would be to require surrender of the sovereign power of Congress to decide who are undesirable aliens. We submit that there is no basis in either reason or authority for petitioner's contention that the de-

422, 423 (C. C. A. 6): "There is no constitutional limit to the power of Congress to exclude or expel aliens;" *United States ex rel. Dickman* v. *Williams*, 183 Fed. 904, 905 (S. D. N. Y.): "Congress could provide for the exclusion of every alien in the country or of any class of aliens."

[69] *Chae Chan Ping* v. *United States* (*The Chinese Exclusion Case*), 130 U. S. 581, 609; *Bugajewitz* v. *Adams*, 228 U. S. 585, 591; *Ng Fung Ho* v. *White*, 259 U. S. 276, 279–280; *Mahler* v. *Eby*, 264 U. S. 32, 39; *Chung Yim* v. *United States*, 78 F. 2d 43, 45 (C. C. A. 8); *Chin Shee* v. *White*, 273 Fed. 801, 804 (C. C. A. 9); *Sire* v. *Berkshire*, 185 Fed. 967, 971 (W. D. Tex.).

[70] Though we deem the distinction immaterial, it may be noted that the 1940 amendment did not provide for deportation upon the basis of an act that was not a basis for deportation when done. Petitioner's membership in and affiliation with the Communist Party and his affiliation with the Marine Workers Industrial Union were grounds of deportation at whatever time or times such membership or affiliation occurred. The 1940 amendment simply removed the requirement that such membership or affiliation should have continued to the time of issuance of the warrant of arrest.

portation statute is retrospective legislation offensive to due process. Such a contention is wholly inconsistent with the fundamental nature of the deportation power.

C. *As to illegal discrimination against petitioner in ordering deportation on the basis of past affiliation with the Marine Workers Industrial Union.*—On January 3, 1934, the Commissioner of Immigration and Naturalization, with the approval of the Assistant to the Secretary of Labor, rendered an advisory ruling (Alien's Ex. 15, R. 3695–3696) to the effect that an alien's membership in any one of a number of listed organizations affiliated with the Trade Union Unity League, one of which was the Marine Workers Industrial Union, should not be used as the sole ground of deportation. Petitioner contends (Br. 72–73) that since this ruling no other alien has been ordered deported for membership in or affiliation with the Marine Workers Industrial Union, and that for him to be singled out is a violation of due process in that such action is a denial of equal protection of the laws. Assuming that due process may embrace the concept of equal protection of the laws (see *Hirabayashi* v. *United States*, 320 U. S. 81, 100; *Detroit Bank* v. *United States*, 317 U. S. 329, 337–338, and cases cited) we submit that the contention is nevertheless without merit.

The advisory ruling of January 3, 1934, was based upon an opinion (R. 3689–3695) of the then Solicitor of the Department of Labor to the effect

that an alien ought not to be deported on the basis alone of membership in the National Miners Union, an organization affiliated with the Trade Union Unity League; and it was also based upon assurances received from the Trade Union Unity League that on July 1, 1933, it had severed its affiliation with the Red International of Labor Unions (R. 3695; Alien's Ex. 25, R. 5248–5249). The record in the present case shows (see *supra*, pp. 71–74) that in July 1933 the Trade Union Unity League had merely, for strategical reasons, ceased publicly to avow its affiliation with the Red International, and that no actual severance of affiliation occurred. Moreover, the Solicitor's opinion specifically recognized that the evidence then before him was not "so clear that a reasonable man could not reach a different result" (R. 3691); it discussed the relation of courts to the deportation process (R. 3692–3693), and pointed out that judicial precedents existed whereby a deportation order based on the evidence before him would have to be sustained by the courts (see *Greco* v. *Haff*, 63 F. 2d 863, 864 (C. C. A. 9); *Kjar* v. *Doak*, 61 F. 2d 566, 567 (C. C. A. 7); *Murdoch* v. *Clark*, 53 F. 2d 155, 156 (C. C. A. 1); and it concluded by emphasizing that the Secretary of Labor, as the independent trier of fact on the evidence was not bound by the decisions of her predecessors—that "succeeding Secretaries of Labor and later decades may view the danger as less real and may interpret the facts differently

or weight [sic] the evidence with altered results. It is of cardinal importance that in such close cases the Secretary of Labor should recognize that he is free to decide either way; no court decision even on the very case he is considering can properly be cited to restrain his choice; if he selects deportation he should realize that [it] is because it is his administrative pleasure to perpetuate the policies of his predecessor and not because it is his duty under court decisions" (R. 3693).

But just as the then Secretary of Labor was not bound by the decisions of her predecessors, by the same token succeeding administrators of the deportation laws are not bound by her 1934 ruling; and we submit that the Solicitor's opinion on which that ruling was based makes this clear.

It is thus apparent that the 1934 ruling was merely an advisory ruling based on evidence then before the Department, and that the Presiding Inspector was correct in ruling that it "has no binding effect in this proceeding" (R. 207). It was only an exercise of fact finding and executive, as distinguished from legislative, discretion. It could not be otherwise, for the deportation statute itself determines the kinds of organizations whose alien members or affiliates it requires to be deported; and it delegates to the administrative agency (now the Attorney General) no power to define such organizations or to vary the statutory definitions, but merely the power to determine whether the evidence before the administrator at

a given time brings an individual organization within one of the statutory definitions. Even the latter power is not given as a legislative power to be exercised prospectively, but as a fact-finding power to be exercised from case to case. The Solicitor's opinion on which the advisory ruling was based specifically recognized the lack of any power in the Secretary of Labor to bind her successors, and the fact that her ruling would be merely a factual determination on evidence then before her. As the district court held, the deportation of alien members or affiliates of organizations found on sufficient evidence to fall within the statutory definitions "is mandatory and not discretionary" (R. 734); and the Department of Labor was without power, by its findings as of a given time, to grant a permanent exemption to any such aliens, just as it would have been without power to order the deportation of alien members or affiliates of organizations not falling within any of the statutory definitions.

We know of no authority, and the petitioner cites none, holding that the enforcement of a statute against one falling within its terms constitutes a denial of the equal protection of the laws merely because the enforcing agency may in the past or present have failed to perform its mandatory duty of enforcing it against others in like case. Cf. *Thompson* v. *Spear*, 91 F. 2d 430, 433–434 (C. C. A. 5), certiorari denied, 302 U. S. 762.

The grave consequences of such a doctrine to the power of government to correct a prior erroneous interpretation or past laxity in enforcement are too obvious to require exposition.

D. *The absence of argument before the Attorney General as a denial of due process.*—Petitioner charges (Br. 75–78) that he was denied due process by the action of the Attorney General in overruling the determination of the Board of Immigration Appeals without according him "fresh opportunity for hearing" to enable him "to reach the deciding officer's mind." The regulations of the Immigration and Naturalization Service make no provision for oral or written argument before the Attorney General, but provide merely that the Attorney General "will state in writing his conclusions and the reasons for his decision." Rule 90.12 (8 C. F. R., 1940 Supp., 90.12). Oral argument as such is not essential to a fair hearing (*Morgan* v. *United States,* 298 U. S. 468, 481); even where oral argument is altogether denied, it has been held that it is not an "essential ingredient of procedural due process and a fair hearing," *Peoria Braumeister Co.* v. *Yellowley,* 123 F. 2d 637, 639 (C. C. A. 7). Here, both oral and written argument were fully made before the Presiding Inspector and the Board of Immigration Appeals; and the Attorney General had before him not only the written conclusions of these respective hearing officials, but also the

briefs of the parties filed with them. Since petitioner's objections to the Findings and Conclusions recommended by the Presiding Inspector were elaborately developed in his brief before the Board, as well as in the Board's own opinion which accepted those objections, the Attorney General had before him at the time of his decision all material necessary to a complete understanding of petitioner's contentions.

Nevertheless, petitioner suggests (Br. 77) that "when issues are freshly brought to focus before a new deciding officer the specific grounds upon which he proposes to overturn an existing public decision (if such be his disposition) [must] be given the person to be adversely affected." We do not so understand the responsibilities of reviewing tribunals, whether administrative or judicial. So far as we are aware, it has never been held that once the issues have been clearly posed by actual or recommended findings below, a reviewing tribunal must announce in advance its proposed opinion on such issues and permit argument specifically directed to the contents thereof. It is a commonplace of judicial procedure that in such a case neither a court nor an administrative agency is confined to the arguments of counsel in selecting the grounds of its decision whether or not to accept such findings. See *Garland* v. *Davis*, 4 How. 131, 143.

Much is made (Pet. Br. 75–76) of the fact that the circumstances in which the Attorney General undertook to render final decision in the case did not fall within the categories specified in Rule 90.12 for review by him of the decision of the Board of Immigration Appeals, and that he gave no notice to petitioner that he proposed personally to decide the case. There can be no question that the Attorney General under the deportation statute is the final deciding authority, and that it is within his discretion both to delegate his authority and to revoke such delegation if and when in his judgment the occasion requires. We have stated above our reasons for believing that no consideration of due process required new oral or written argument before the Attorney General as the foundation for his decision, once full argument of all the issues had been made before the tribunals below and the opposing contentions of the parties had been made plain to him by the briefs of counsel filed below and the written Findings and Conclusions of Judge Sears and the Board of Immigration Appeals. If this would have been so had the case been formally referred to him by the Board for final decision pursuant to the regulations, it is no less so in a case where he chose to recall final decisional authority to himself *dehors* the regulations.

Here it has not been—and in view of the Attorney General's careful opinion it could not

reasonably be—claimed that the Attorney General failed to give full and fair consideration to the entire record, as well as to the opposing contentions of counsel. Due process, we believe, requires no more.

* * * * *

As we have pointed out (*supra*, p. 94; cf. fn. 57, p. 95), it is not clear that petitioner claims that any of the supposed procedural abuses touched on above is of such a character as should by applicable standards be held to vitiate the deportation order. Rather it would seem that petitioner seeks to invest the proceeding as a whole with some indefinable aura of unfairness resulting from a series of considerations which would not of themselves warrant judicial intervention. The basic question is, of course, whether in the last analysis, by enlightened standards, petitioner received a full and fair hearing. We submit that a reading of the record admits of no doubt on this question. Seldom, if ever, has an alien been accorded, and taken advantage of, so full an opportunity to develop every possible aspect of his opposition to the Government's charge in a deportation case. Petitioner was represented throughout by counsel who showed themselves thoroughly versed in all elements of deportation law, both substantive and procedural. The Presiding Inspector was a highly qualified judge, experienced in both the

trial and appellate review of litigation,[11] and totally disconnected from the Department of Justice. His impartiality, consideration, and thoroughness stand out brilliantly in the record. Petitioner was allowed the utmost in cross-examination of the Government's witnesses, and produced 29 witnesses of his own, in addition to himself—although, be it noted, no witnesses other than himself to testify directly to his non-membership in the organizations involved.[12] By according petitioner the benefit of the doubt, Judge Sears and the Attorney General resolved issue after issue of fact in his favor, or in such a way as to work him no prejudice. In the end, the case came down to a square issue of credibility as between petitioner and those of the Government's witnesses who still stood unimpeached. Judge Sears, who saw and heard the witnesses, disbelieved petitioner; and the Attorney General sustained Judge Sears. That Judge Sears may have been wrong is of no consequence on the issue of whether

[11] Judge Sears was a Justice of the Supreme Court of the State of New York from 1927 to January 3, 1943, assigned to the Appellate Division, Fourth Department, from 1922 to 1940, and Presiding Justice from 1929 to 1940. He then became an Associate Judge of the Court of Appeals of New York, retiring on December 31, 1942.

[12] The majority of petitioner's witnesses merely testified to facts tending to impeach the character or veracity of the Government's witnesses; a smaller number testified essentially that petitioner, whether or not a Communist, was a "good" labor leader. Some testified that they did not believe he was a Communist.

petitioner received a full and fair hearing. We submit that unquestionably he did.

III

THE DEPORTATION STATUTE AS CONSTRUED AND APPLIED TO PETITIONER DOES NOT VIOLATE PETITIONER'S CONSTITUTIONAL GUARANTEES OF FREE SPEECH AND ASSOCIATION

Relying on the long series of cases in this Court which have set boundaries in a variety of circumstances to federal and state action restricting the constitutional rights of freedom of speech, assembly, and religion, petitioner contends (Br. 80–104) that the deportation statute, as here construed and applied to him, denies to him rights of free speech and free association guaranteed to him by the First and Fifth Amendments. As construed and applied to petitioner the statute calls for his deportation on evidence which shows membership in and affiliation with an organization advocating overthrow of the Government by force and violence.[73] The Government did not claim

[73] The amendment of the 1918 Act (c. 186, 40 Stat. 1012) by the Act of June 5, 1920 (c. 251, 41 Stat. 1008–1009) was for the specific purpose of resolving doubts previously thought to exist and making clear that mere membership in an organization falling within the description of the statute should be "of itself the overt act sufficient to warrant deportation." H. Rep. 504, 66th Cong., 2d Sess., 1919, p. 7.

The 1918 Act itself was in the nature of an amendment to Sec. 3 of the general immigration and deportation statute (Act of February 5, 1917, c. 29, 39 Stat. 874, 875–876) for

that petitioner personally advocated or believed in such a doctrine (see R. 1527). Petitioner testified that he believed in collective bargaining as a device to settle labor disputes and that he favored strikes only after other methods failed (R. 5885–5888); he was opposed to state syndicalism statutes because it was his opinion that they were used against legitimate union activity, although he did not believe in the tenets of syndicalism (R. 6069, 6484–6485). Generally, in discussing Communism with avowed Communists, he argued against it (R. 6095). Nor was the case tried or decided on the theory that the "clear and present danger" test set by *Schenk* v. *United States*, 249 U. S. 47, 52, had application. If, as has never hitherto been held by this Court, the sovereign power of the United States to deport aliens from its shores is deemed to be limited by the same considerations which under the First and Fifth Amendments would preclude criminal prosecution or other forms of public restraint, then only do the deci-

---

the specific purpose of resolving doubts previously thought to exist as to whether the phrase "persons who believe in or advocate the overthrow by force or violence of the Government of the United States or of all forms of law," as used in the 1917 Act, had been intended as merely explanatory of and limited by the term "anarchists." H. Rep. 645, 65th Cong., 2d Sess., 1918, p. 1. The legislative history does not establish that the amendment was adopted with Communists particularly in mind, but it is worthy of note that the proposal of the amendment (June 8, 1918) followed not long after the Bolshevik Revolution in Russia.

sions of this Court give force to petitioner's argument that the statute as construed and applied to him violates his constitutional rights. See e. g., *Yick Wo* v. *Hopkins*, 117 U. S. 356, 369; *Lem Moon Sing* v. *United States*, 158 U. S. 538, 547; *Wong Wing* v. *United States*, 169 U. S. 649, 695; *Truax* v. *Raich*, 239 U. S. 33, 39; *Whitney* v. *California*, 274 U. S. 357, esp. Brandeis and Holmes, JJ., concurring, at pp. 372 et seq.; *De Jonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242; *Thomas* v. *Collins*, No. 14, this Term; cf. *Bridges* v. *California*, 314 U. S. 252. Cf. also *Dunne et al.* v. *United States*, 138 F. 2d 137 (C. C. A. 8), certiorari denied, 320 U. S. 790, rehearing denied, 320 U. S. 814, 815, upholding the conviction of citizens for violation of Title I of the Alien Registration Act, 1940, (c. 439, Title I, 54 Stat. 670–671, 18 U. S. C. 9–13). However, we do not believe that this question is reached,[74] since other decisions of this Court point to the conclusion that the power of Congress to provide for deportation of resident aliens is limited only by the due process requirement of a fair hearing at

[74] Although this question was raised and argued by petitioner in the court below, that court failed to pass upon it. The district court held (R. 735–740) that the deportation statute was not invalid as violating petitioner's rights of freedom of speech and assembly, since its curtailment, if any, of those rights was "a curtailment consonant with the constitutional guarantees of the Bill of Rights."

which the statutory grounds for deportation are established, and is unaffected by considerations which in other contexts might justify the striking down of legislation as an unwarranted abridgment of constitutionally guaranteed rights of free speech and association.

In 1904 this Court in *Turner* v. *Williams*, 194 U. S. 279, considered the application of the Immigration Act of March 3, 1903, 32 Stat. 1213, which provided for the exclusion of alien "anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States or of all government or of all forms of law, or the assassination of public officials." The case arose out of the exclusion of Turner, an Englishman, who admitted that he was an anarchist and an advocate of anarchistic principles. The Court rejected the contention that this statute was unconstitutional because no power "is delegated by the Constitution to the General Government over alien friends with reference to their admission into the United States or otherwise, or over the beliefs of citizens, denizens, sojourners or aliens, or over the freedom of speech or of the press" (194 U. S. at 289). In commenting upon this contention, the Court said (pp. 289–290):

> Repeated decisions of this court have determined that Congress has the power to exclude aliens from the United States; to

prescribe the terms and conditions on which they may come in; to establish regulations for sending out of the country such aliens as have entered in violation of law, and to commit the enforcement of such conditions and regulations to executive officers; that the deportation of an alien who is found to be here in violation of law is not a deprivation of liberty without due process of law, and that the provisions of the Constitution securing the right of trial by jury have no application. *Chae Chan Ping* v. *United States,* 130 U. S. 581; *Nishimura Ekiu* v. *United States,* 142 U. S. 651; *Fong Yue Ting* v. *United States,* 149 U. S. 698; *Lem Moon Sing* v. *United States,* 158 U. S. 538; *Wong Wing* v. *United States,* 163 U. S. 228; *Fok Yung Yo* v. *United States,* 185 U. S. 296; *Japanese Immigrant Case,* 189 U. S. 86; *Chin Bak Kan* v. *United States,* 186 U. S. 193; *United States* v. *Sing Tuck,* 194 U. S. 161.

* * * * *

Whether rested on the accepted principle of international law that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe; or on the power to regulate commerce with foreign nations, which includes the entrance of ships, the importation of goods, and the bringing of

persons into the ports of the United States, the act before us is not open to constitutional objection.

The Court then addressed itself to the issue of civil liberties (194 U. S. at 292):

> We are at a loss to understand in what way the act is obnoxious to this objection. It has no reference to an establishment of religion nor does it prohibit the free exercise thereof; nor abridge the freedom of speech or the press; nor the right of the people to assemble and petition the government for a redress of grievances. It is, of course, true that if an alien is not permitted to enter this country, or, having entered contrary to law, is expelled, he is in fact cut off from worshipping or speaking or publishing or petitioning in the country, but that is merely because of his exclusion therefrom. He does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law. To appeal to the Constitution is to concede that this is a land governed by that supreme law, and as under it the power to exclude has been determined to exist, those who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise.

And, finally with respect to the argument that the act was unconstitutional because it applied to all anarchists, including those who are merely

political philosophers, whose teachings are beneficial, the Court said (194 U. S. at 294):

> * * * it would follow that Congress was of opinion that the tendency of the general exploitation of such views is so dangerous to the public weal that aliens who hold and advocate them would be undesirable additions to our population, whether permanently or temporarily, whether many or few, and, in the light of previous decisions, the act, even in this aspect, would not be unconstitutional, or as applicable to any alien who is opposed to all organized government.

So far as we know, there has been no further discussion by this Court of the question whether the power to admit and to deport aliens is subject to the prohibitions of the First Amendment. But that the force of the decision in the *Turner* case has been unaffected by recent decisions is intimated by its citation in the majority opinion and in the concurring opinion of Mr. Justice Douglas in *Schneiderman* v. *United States*, 320 U. S. 118, at 131–132; 165, with reference to the right of Congress to impose such conditions as it sees fit upon the privilege of naturalization. See also *United States ex rel. Volpe* v. *Smith*, 289 U. S. 422, 425: "The power of Congress to prescribe the terms and conditions upon which aliens may enter or remain in the United States is no longer open to serious question. *Turner* v. *Williams*, 194 U. S. 279; *Low Wah Suey* v. *Backus*,

225 U. S. 460, 468; *Bugajewitz* v. *Adams*, 228 U. S. 585, 591." And it is significant that in *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149, and *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, deportation of aliens on charges of personal advocacy of violent overthrow of the Government was upheld by this Court without discussion of the application of the "clear and present danger" test which has been held to inhere in the application of the First Amendment.

It is true that the Court in *Turner's* case was not dealing with the deportation of a resident alien, but the distinction has not been found significant in other contexts. In the *Bilokumsky* case, *supra*, the alien had been in the United States for nine years prior to the institution of the deportation proceeding, and it does not appear that the proceeding was predicated in any way upon a charge of illegal entrance. "The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power." *Fong Yue Ting* v. *United States*, 149 U. S. 698, 713. Furthermore, aliens who have acquired a deportable status through their actions while permitted to remain in this country may be "decidedly more objectionable." Cf. *United States ex rel. Volpe* v. *Smith*, 289 U. S. 422, 425.

The lower federal courts have not granted to

resident aliens any greater right to claim the protection of the First Amendment than was denied to an unlawful entrant in *Turner* v. *Williams, supra.* See *Lopez* v. *Howe,* 259 Fed. 401 (C. C. A. 2), appeal dismissed and certiorari denied, 254 U. S. 613, 650; *Ex parte Pettine,* 259 Fed. 733, 735–736 (D. Mass.); *United States ex rel. Fortmueller* v. *Commissioner of Immigration,* 14 F. Supp. 484, 486–487 (S. D. N. Y.); cf. *United States* v. *Parson,* 22 F. Supp. 149, 155, fn. 2 (S. D. Calif.), reversed on other grounds, 99 F. 2d 746 (C. C. A. 9).[75] And the lower federal courts have likewise not regarded the imminence of changes in government which an alien may advocate as a factor going to the validity of the deportation statutes. See *United States ex rel. Georgian* v. *Uhl,* 271 Fed. 676, 677 (C. C. A. 2), certiorari denied, 256 U. S. 701; *Kjar* v. *Doak,* 61 F. 2d 566, 568–569 (C. C. A. 7); *United States ex rel. Abern* v. *Wallis,* 268 Fed. 413, 416 (S. D. N. Y.).

Since naturalization is, like the right of an alien to remain in the country, a privilege which Congress may extend upon such conditions as it sees fit, it is within the competence of Congress to

[75] In *Colyer* v. *Skeffington,* 265 Fed. 17, 60 (D. Mass.), the court expressed the view that immigration statutes were to be construed with regard to the "First Amendment and its declaration for freedom of speech, press, and assemblage." However, that view may be deemed to have been rejected by the Circuit Court of Appeals for the First Circuit by reason of its reversal of the decision of the district court, *sub nom. Skeffington* v. *Katzeff,* 277 Fed. 129.

deny naturalization to an alien on the ground of utterances, beliefs, or associations for which, by the protection of the First Amendment, he could not be punished. *United States* v. *Schwimmer*, 279 U. S. 644, 649–650; *United States* v. *Macintosh*, 283 U. S. 605, 615–619. It would seem that the sovereign power of deportation (*Tiaco* v. *Forbes*, 228 U. S. 549, 556–557) would be subject to no greater restraint.

In his petition for a writ petitioner cited the doctrine of unconstitutional conditions (Pet. 43–44); but whatever the effect of this doctrine upon the civil rights of a resident alien in his status as such (cf. *Wong Wing* v. *United States*, 163 U. S. 228), it does not, we believe, extend to protect him against the orderly termination of that status for whatever reasons may seem to Congress necessary or desirable in the public interest. The "reasonable relation" doctrine to which petitioner adverts at pp. 99–104 of his brief has likewise never been given application in this area. We know of no case in which this Court has imposed or suggested limitations upon the plenary authority of Congress to determine the grounds upon which an alien may be deported.

By excluding from the impact of the deportation statute an alien's political beliefs or attachments acquired after his entrance, Congress could, in its discretion, have transmuted the substantive constitutional guarantees of the First and Fifth Amendments into legal rights conferred upon

aliens lawfully resident in the country. But the choice has heretofore been deemed to be legislative, not constitutional. Congress has unquestionably chosen to regard as undesirable residents in this country aliens who associate themselves with political beliefs directed to the overthrow of this Government by force or violence.[76] We believe that it had a constitutional right so to choose.

CONCLUSION

It is respectfully submitted that the judgment below should be affirmed.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
ROBERT S. ERDAHL,
LEON ULMAN,
Attorneys.

MARCH 1945.

[76] See fn. 73, p. 115, *supra*.

APPENDIX A

Statutory Provisions

Sections 1 and 2 of the Act of October 16, 1918 (c. 186, 40 Stat. 1012), as amended by the Act of June 5, 1920 (c. 251, 41 Stat. 1008–1009) and the Act of June 28, 1940 (c. 439, Title II, sec. 23, 54 Stat. 673, 8 U. S. C. 137), provide, in pertinent part, as follows:

> That any alien who, at any time, shall be or shall have been a member of any one of the following classes shall be excluded from admission into the United States:
>
> * * * * * *
>
> (c) Aliens * * * who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States * * *.
>
> * * * * * *
>
> (e) Aliens who are members of or affiliated with any organization, association, society, or group, that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in subdivision (d) [advising, advocating or teaching the overthrow by force or violence of the Government of the United States].

For the purpose of this section: (1) the giving, loaning or promising of money or any thing of value to be used for the advising, advocacy, or teaching of any doctrine above enumerated shall constitute the advising, advocacy, or teaching of such doctrine; and (2) the giving, loaning or promising of money or any thing of value to any organization, association, society, or group, of the character above described shall constitute affiliation therewith; but nothing in this paragraph shall be taken as an exclusive definition of advising, advocacy, teaching, or affiliation.

SEC. 2. Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in section 1 of this Act, shall, upon the warrant of the Attorney General,[77] be taken into custody and deported in the manner provided in the Immigration Act of February, 1917.[78] The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.

Section 19 of the Act of February 5, 1917 (c. 29, 39 Stat. 889, 8 U. S. C. 155) provides, in pertinent part, as follows:

> In every case where any person is ordered deported from the United States

[77] By Reorganization Plan No. V, effective June 14, 1940 (54 Stat. 230, 1238, 5 U. S. C., fol. 133t; 5 U. S. C. 133v), the administration of the immigration and naturalization laws was transferred from the Secretary of Labor to the Attorney General.

[78] The Act of February 5, 1917 (c. 29, 39 Stat. 874–898, 8 U. S. C. 101, et seq.).

under the provisions of this Act or of any law or treaty, the decision of the Secretary of Labor shall be final."[79]

ADMINISTRATIVE REGULATIONS

Rules 90.12, 150.1 (c), 150.1 (d) and 150.6 (i) of the Regulations of the Immigration and Naturalization Service (8 C. F. R. 90.12, 1940 Supp., 150.1 (c), 150.1 (d), 150.6 (i), 1941 Supp.) provide, in part, as follows:

> 90.12 *Board of Immigration Appeals; reference of cases to the Attorney General.* In any case in which a dissent has been recorded; in any case in which the Board shall certify that a question of difficulty is involved; in any case in which the Board orders the suspension of deportation pursuant to the provisions of section 19 (c) of the Immigration Act of 1917, as amended, or in any case in which the Attorney General so directs, the Board of Immigration Appeals shall refer the case to the Attorney General for review of the Board's decision. In any case in which the Attorney General shall reverse the decision of the Board, or in any case in which suspension of deportation is ordered pursuant to the provisions of section 19 (c) of the Immigration Act of 1917, as amended, the Attorney General will state in writing his conclusions and the reasons for his decision.
>
> 150.1 (c) *Investigations; interrogation of aliens under investigation.* All statements secured from the alien or any other

[79] Since June 14, 1940, the immigration laws have been administered by the Attorney General. See fn. 77, p. 127, *supra*.

person during the investigation, which are to be used as evidence, shall be taken down in writing; and the investigating officer shall ask the person interrogated to sign the statement. Whenever such a recorded statement is to be obtained from any person, the investigating officer shall identify himself to such person and the interrogation of that person shall be under oath or affirmation. Whenever a recorded statement is to be obtained from a person under investigation, he shall be warned that any statement made by him may be used as evidence in any subsequent proceeding.

"150.1 (d) *Investigations; refusal to make recorded statement under oath or affirmation.* Whenever, in the course of an investigation, admissions or statements are obtained from an alien or statements are made by any other person which indicate that the alien may be subject to arrest and deportation, but the alien or other person refuses to make a recorded statement under oath or affirmation or refuses or is unable to sign the recorded statement by name or by mark, the investigating officer shall make a report in writing to the officer-in-charge, setting forth the facts admitted or stated as to the alien's status under the immigration laws. This report may be used in support of an application for a warrant of arrest, when the investigating officer certifies that no other evidence to establish the facts stated in the report can be readily obtained. Statements obtained in confidence may be included in such report, without disclosure of their source, only if the officer in charge certifies that in his belief such statements are trustworthy.

150.6 (i) ***Hearing; use of statement or admissions made during investigation.*** A recorded statement made by the alien (other than a General Information Form) or by any other person during an investigation may be received in evidence only if the maker of such statement is unavailable or refuses to testify at the warrant hearing or gives testimony contradicting the statements made during the investigation. An affidavit of an inspector as to the statements made by the alien or any other person during an investigation may be received in evidence, otherwise than in support of the testimony of the inspector, only if the maker of such statement is unavailable or refuses to testify at the warrant hearing or gives testimony contradicting the statement and the inspector is unavailable to testify in person.

APPENDIX B

The literature introduced by the Government to which reference is made in the Argument, *supra*, pp. 23–43, on the issue of whether the Communist Party was an organization that advocated the overthrow of the Government by force and violence, is as follows:[80]

Ex. 91, R. 1031, *Marx and Engels, "Manifesto of the Communist Party."* This was published in 1932 by International Publishers. See *Schneiderman*, Ex. 7, R. 123.

Ex. 94, R. 1037, *"Theses and Statutes of the Third (Communist) International."* This edition was reprinted by the United Communist Party of America. See *Schneiderman*, Ex. 26, R. 274, 835.

Ex. 97, R. 1059, "The Communist," Vol. I, No. 1, June 12, 1920. This was the official organ of the United Communist Party of America and was published bi-weekly under direction of the Central Executive Committee (p. 2).

Ex. 98, R. 1060, "The Communist," Vol. I, No. 1, July 1921. This was the official organ of the Communist Party of America. The year "1921" appears in pencil. See R. 1059–1060.

Ex. 99, R. 1061, "The Workers Monthly," Vol. V, No. 11, September 1926. This was the official organ of the Workers Communist Party of America.

Ex. 104, R. 1069, "The Party Organization, Workers (Communist) Party of

[80] We have italicized those documents which were also introduced by the Government in the Schneiderman case.

America." This was published about September 1925 (see p. 40) for the Party by the Daily Worker Publishing Co.

Ex. 105, R. 1070, *Lenin; "'Left Wing' Communism, An Infantile Disorder."* This was written by Lenin in 1920 (pp. 103, 115), and this edition was published by the Marxian Educational Society, Detroit, Michigan, in 1921. Other editions were published and distributed by the Communist Party (R. 1069). See *Schneiderman*, Ex. 9, R. 144. The edition in the *Schneiderman* case was published by International Publishers in 1934.

Ex. 108, R. 1074, "*Program and Constitution, Workers Party of America, adopted at National Convention, New York City, December 24-25-26-1921.*" Cf. *Schneiderman*, Ex. 27, R. 276, which is the "Program and Constitution of the Workers Party of America," adopted at National Convention, December 1921, amended at National Convention, 1923–1924.

Ex. 109, R. 1075, "The Worker", Vol. VI, No. 264, March 3, 1923. This was published weekly (p. 1) and was the official organ of the Workers Party (R. 1074).

Ex. 111, R. 1077, "The Worker," Vol. VI, No. 258, January 20, 1923.

Ex. 112, R. 1078, "*The Second Year of the Workers Party of America,*" (including the constitution, program, and the report of the Central Executive Committee to the Third National Convention held December 30, 31, 1923, and January 1, 2, 1924). This work was published by the Literature Department of the Workers Party of America. See *Schneiderman*, Ex. 13, R. 248.

Ex. 120, R. 1117, *Olgin, "Why Communism? Plain Talks on Vital Problems."* This was first published in 1933, and the

present edition in evidence was the second revised edition published by Workers Library Publishers in May 1935 (see inside cover). See *Schneiderman*, Ex. 18, R. 166.

Ex. 129, R. 1219, "Thesis and Resolutions for the Seventh National Convention of the Communist Party of U. S. A., by Central Committee Plenum, March 31–April 4, 1930." This was issued, distributed, and circulated by the Communist Party (R. 1216).

Ex. 130, R. 1220, "Struggles ahead! Thesis on the Economic and Political Situation and the Tasks of the Communist Party, adopted by the Seventh National Convention, June 20–25, 1930." This was published by the Communist Party of the U. S. A. (see inside cover).

Ex. 135, R. 1445, William Z. Foster, "From Bryan to Stalin." This work was published by International Publishers, copyright 1937. It was circulated and distributed by the Communist Party (R. 1444).

Ex. 145, R. 1460, "The Communist," Vol. XVII, No. 1, January 1938. This was a magazine published monthly by the Communist Party of the U. S. A. (see title page).

Ex. 164, R. 1476, "The Communist," Vol. XVIII, No. 9, September, 1939. This issue contains a review of the twenty years' history of the Communist Party of the U. S. A.

Ex. 182, R. 1486, *Lenin, "State and Revolution."* This work was written by Lenin in August and September 1917 (p. 101). This edition was published by International Publishers Co., Inc., copyright 1932, and is the third printing, 1935, 100,000 copies (see page facing table of contents). See *Schnei-*

derman, Ex. 8, R. 129. The edition in the *Schneiderman* case was published by the Daily Worker Publishing Company in April 1924.

Ex. 183, R. 1490, *Stalin, "Foundations of Leninism."* This was published by International Publishers, copyright 1932, Tenth Anniversary Edition 1934, 100,000 copies (see reverse side of title page). See *Schneiderman,* Ex. 11, R. 212, Stalin, "The Theory and Practice of Leninism." These appear to be different translations of the same work.

Ex. 184, R. 1491, Lenin, "A Letter to American Workers." This was written on August 20, 1918 (p. 22), and was published by International Publishers Co., Inc., copyright 1934 (see reverse side of title page and p. 8).

Ex. 220, R. 2074, "The Trade Union Unity League, affiliated to R. I. L. U., its Program, Structure, Methods and History." This was published by the Trade Union Unity League, probably in 1930 (R. 2075).

Ex. 221, R. 2080, Honig, "The Trade Union Unity League Today, its Structure, Policy, Program and Growth." This was published by Labor Unity Publishers, first printing, April 1934; revised edition, June 1934 (see title page).

Ex. 228, R. 2089, "15 Years of the Communist International." This pamphlet was published by Workers Library Publishers (see back cover) in about 1935 (R. 2089) and contains the theses of the Agitprop of the Executive Committee of the Communist International (see inside cover).

Ex. 231, R. 2093, Browder, "What is Communism?" This work was published

by Workers Library Publishers in 1936 (see title page).

Ex. 232, R. 2097, "The Communist," Vol. VIII, No. 7, July 1929.

There are also in evidence the following documents in the *Schneiderman* case to which reference is not made in our Argument:

Ex. 95, R. 1051–1052, "Program of the Communist International," containing the program adopted September 1, 1928, *Schneiderman,* Ex. 6, R. 109; Ex. 101, R. 1066 "The Fourth National Convention of the Workers (Communist) Party of America," held August 21–30, 1925, *Schneiderman,* Ex. 12, R. 241; Ex. 102, R. 1067, "The Platform of the Class Struggle, National Platform of the Workers (Communist) Party, 1928, *Schneiderman,* Ex. 15, R. 264; Ex. 158, R. 1473, "The Constitution and By-Laws of the Communist Party of the U. S. A.," adopted May 1938, *Schneiderman,* Ex. 5, R. 84.

The following documents introduced in the *Schneiderman* case do not appear to have been introduced in this case:

Ex. 10, R. 152, "Program of the Young Communist International;" Ex. 14, R. 255, "Acceptance Speeches of William Z. Foster and Benjamin Gitlow," published in 1928; Ex. 16, R. 187, Bucharin and Preobraschensky, "ABC of Communism;" Ex. 17, R. 270, "The International of Youth," organ of the Executive Committee of the Young Communist International; Ex. 19, R. 273, "New Frontiers," yearbook of the Young Communist League.

U. S. GOVERNMENT PRINTING OFFICE: 1945